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THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Human rights as the primary objective of international trade, investment and finance policy and practice

Working paper submitted by J. Oloko-Onyango and Deepika Udgama, in accordance with Sub-Commission resolution 1998/12

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Introduction

1. At its fiftieth meeting, the Sub-Commission, in resolution 1998/12, decided "to entrust Mr. J. Oloka-Onyango and Ms. Deepika Udagama with the task of preparing, without financial implications, a working paper on ways and means by which the primacy of human rights norms and standards could be better reflected in, and could better inform, international and regional trade, investment and financial policies, agreements and practices, and how the United Nations human rights bodies and mechanisms could play a central role in this regard". In addition, the Sub-Commission requested the two experts "to include in this paper an analysis of the Multilateral Agreement on Investment (MAI) from a human rights perspective, and to consider ways to ensure that future negotiations on the Agreement or analogous agreements or measures take place within a human rights framework". 1/

2. Negotiations relating to the MAI were formally terminated in December 1998 by the Organization for Economic Cooperation and Development (OECD) 2/ on account of several factors, including the inability of the participants in the discussions to agree on key aspects of the draft text, and also from the opposition to the process mounted by environmental, consumer-protection and labour organizations, among others. 3/ Needless to say, the specific process of negotiation, the draft text itself and the broader questions involved in the process necessitate a comprehensive examination of the issue from a human rights perspective. This is because the world is approaching a new and potentially revolutionary epoch in human history. There is a real threat that it may become an epoch in which the unmitigated promotion of increased international trade, investment and finance at the expense of the observance and protection of fundamental human rights and sustainable human development (SHD) is adopted as a mantra guiding many Governments and development economists as was amply demonstrated in the MAI process. Consequently, the complexities of ensuring a more comprehensive and truly universal regime of human rights observance grow rather than diminish.

3. Although the MAI process within the OECD has come to a halt, there are many reasons why the debate generated by the negotiations continues to be of relevance. First and foremost is the fact that aspects of the draft provisions that were at the core of the MAI were borrowed from earlier contexts, such as the North American Free Trade Agreement (NAFTA) and bilateral treaties (BITs). 4/ In which human rights questions remain

important. 5/ Secondly, the pressure for developing a comprehensive multilateral regime based on investment remains and is likely to increase under the impetus of continuing demands for safeguards against accelerated trade and investment. Finally, the growing influence of global actors like multilateral institutions (MLIs) and transnational corporations (TNCs) on the political economy of trade, investment and finance necessitates heightened scrutiny and oversight of the way in which they operate. 6/ Thus, the relationship between human rights and international trade, investment and finance policy and practice is of paramount importance to the United Nations system, to human rights activists, and to the Sub-Commission. It is particularly important given that the predominant view among economists and policy makers in multilateral institutions is that any hindrances to enhanced global trade and investment are a bad thing for humanity. 7/ However, liberalization in the global regimes of trade, investment and finance does not, ipso facto, lead to more positive impacts on the well-being of humankind in general or to the enhancement of economic development in particular. Nor does such liberalization necessarily lead to the greater protection and observation of human rights. 8/

4. The lesson of unbridled international trade, finance and investment liberalization in the 1990s has been a particularly bitter one for the so-called "Asian tigers". 9/ Although this region of the world experienced phenomenal growth rates, ostensibly spurred on by deregulation and increased foreign investment in the 1970s and 1980s, the last several years have witnessed a significant downturn in economic growth and a slowing in the pace of trade in the region. 10/ Not to mention the very many adverse social and welfare consequences that the depression has had on the population. 11/ In fact, the issue is much more complex. 12/ As the Oxfam Poverty Report points out:

> "Trade has the power to create opportunities and support livelihoods; and it has the power to destroy them. Production for export can generate income, employment, and the foreign exchange which poor countries need for their development. But it can also cause environmental destruction and a loss of livelihoods, or lead to unacceptable levels of exploitation. The human impact of trade depends on how goods are produced, who controls the production and marketing, how the wealth generated is distributed, and the terms upon which

countries trade. The way in which the international trading system is managed has a critical bearing on all of these areas." 13/ International trade is thus "... neither inherently good nor bad" 14/ The "boon" of trade and financial liberalization and deregulation should therefore be approached with caution. 15/ Concomitantly, more attention needs to be paid to the construction of mechanisms that do not allow free rein to the merchants of free trade, the accelerated transfer of finance capital and a field day for investment, regardless of its consequences. 16/

I. AN OVERVIEW OF THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND INTERNATIONAL TRADE, INVESTMENT AND FINANCE POLICY AND PRACTICE

5. The issue under discussion involves both conceptual as well as empirical dimensions, some of which are already under consideration by the Sub-Commission and the Commission on Human Rights. 17/ It also involves both categories of human rights, viz., the civil and political, and the economic, social and cultural. Indeed, the question extends to encompass the right to peace, the right to a healthy environment and, more especially, the right to development. It is not far-fetched to imagine trade disputes becoming the source of armed conflict between States, 18/ while the environmental consequences of unchecked investments have been well documented. 19/ The connection between trade, finance and investment and development is fairly clear.

6. An opportunity is also provided for the international community to reaffirm the integral and interconnected nature of the various categories of human rights re-emphasized in the 1993 Vienna Declaration and Programme of Action. 20/ A critical opportunity is thus presented to consider seriously the gender, racial, class and other discriminatory modes in which the current processes of international trade, investment and finance operate. There is little doubt that those most adversely affected by these processes are women, people of colour, minorities, the poor and other vulnerable communities. 21/ Peasant women in various parts of the "South" are affected by structural adjustment policies (SAPs) which have drastically affected the subsistence economy and led to their migration into export-promotion zones and into the sex trade. 22/ The exploitation of child labour results from persistent poverty, which is worsened by the processes of liberalization that remove basic social protections. 23/ Finally, minorities are generally more adversely affected by liberalization processes because of traditional

discrimination, and on account of long-held prejudices that abound. Marc Brown has pointed out how Gypsies in both Hungary and the Czech Republic have been more adversely affected by labour-downsizing policies. 24/ Unemployment amongst minorities is generally higher than among dominant groups. Given all these factors, it becomes apparent that the development of a comprehensive international regime that considers human rights as an integral component of the conduct of international trade, investment and finance is long overdue. 25/

7. It is important to identify the obligations of global actors such as MLIs and TNCs under international human rights law. 26/ It is also critical to consider the internal mechanisms, policy considerations and operational frameworks by which such organizations are governed. In other words, to what extent do human rights principles guide the process of policy formulation, design and actual implementation within the organizations concerned with the area under investigation? Finally, in this respect, it is important not to forget the interface between the formulation of international trade, investment and finance policy and the disparate operations and practices of TNCs. This dimension of the issue is especially important given that investors, traders and financiers who operate on an international scale are, more often than not, TNCs. 27/

8. A phenomenon that is greatly implicated in the discussion at hand is the issue of globalization. Globalization has been recognized as a development that is taking place at a rapid pace and which has several diverse, even contradictory implications for humankind and the observation and respect for human rights. 28/ In the words of Philip Alston:

> "Leaving aside the developments in science, technology, communications and information processing that have made the world smaller and more interdependent in so many ways, globalization has also come to be closely associated with a variety of trends and policies including an increasing reliance upon the free market, a significant growth in the influence of international financial markets in determining the viability of national policy priorities, a diminution of the role of the state and the size of its budget, the privatization of various functions previously considered to be the exclusive domain of the state, the deregulation of a range of activities designed to facilitate investment

and reward individual initiative, and a corresponding increase in the role and even responsibilities attributed to private actors in the corporate sector and in civil society." 29/

9. The Sub-Commission is taking up the issue of globalization under a separate examination focused primarily on the phenomenon in relation to increasing incidents of racism and xenophobia. 30/ Needless to say, the occurrence of globalization in all its varied manifestations 31/ has tremendous implications for the observation of human rights, and by necessary extension for the future conduct of international trade, investment and finance. 32/

10. From an examination of the international scene today, it may be surmised that we are entering an era of a veritable "clash of globalizations" 33/ This is a situation in which the quest for a more vigorous regime of trade and investment is being countered by calls for more rigourous standards of accountability, transparency and democratic methods of operation from what has become an increasingly "globalized" civil society. 34/ "Both international investors and the electronically networked opposition to the MAI are manifestations of globalization: both compromise the concept of national sovereignty and local control." 35/ This Janus-like quality of the process of globalization means that there are differential benefits and disadvantages for both sides. Given that it is nearly impossible to halt the process of globalization, the critical question then becomes how to arrive at a balance that establishes an appropriate framework which guarantees that human rights standards are not minimized by the phenomenal expansion of international regimes of investment, trade and finance.

II. SOME RELEVANT HUMAN RIGHTS INSTRUMENTS

11. The range of international human rights instruments that are of relevance to the area of international trade, finance and investment policy and practice is extensive. The starting point must be the Charter of the United Nations, Article 1 of which defines the purposes of the organization to include, "... cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Article 55 stipulates that the United Nations will promote, inter alia, higher standards of living, full employment, and conditions of economic and social progress and development, as well as "... universal respect for, and observance of, human rights and fundamental

freedoms for all ...". Article 56 commits all Members "to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55". 36/

12. The International Bill of Rights (comprising the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)), contains several provisions of relevance to this study. In addition, there is the Declaration on the Right to Development, the Charter of Economic Rights and Duties of States, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of Racial Discrimination, the Convention on the Rights of the Child, several conventions promulgated by the International Labour Organization (ILO), the declarations of several world conferences (including those held in Rio de Janiero, Vienna, Copenhagen, Cairo, Istanbul and Beijing) and a host of regional instruments. 37/

13. The last paragraph of the preamble to the UDHR stipulates that the instrument was designed as:

> "... a common standard of achievement for all peoples and all nations, to the end that every *individual and every organ of society* ... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance ..." (emphasis added)

This statement clearly imports the idea that the promotion of human rights is not confined only to governments. 38/ It imposes a duty on everybody (including the family, communities, associations and corporations, to mention a few prominent non-State actors) to promote respect for the rights contained therein and to strive to secure their effective recognition and observance. By implication, this means that actions taken by individuals or institutions that do not promote respect for human rights must be countered. Such obligation also brings MLIs and TNCs into their ambit.

14. Article 1 of the UDHR reiterates the point that all human beings are born free and equal in dignity and rights. The article suggests a number of points, including the fact that rights are not conferred by anybody and that any form of deprivation of human dignity is not acceptable. Indeed, one could argue that the idea of human dignity lies at the foundation of all human

rights principles. 19/ Under article 1 it is incumbent upon individuals, institutions or organizations involved in the formulation of international trade, investment and finance policy to be mindful of the impacts on human dignity that those policies may have. Not to do so places them in contravention of the obligation imposed under this universal standard.

15. The notion of human dignity finds duplication in several of the provisions of the International Covenants on Human Rights. Common article 1 of the ICCPR and the ICESCR proclaims the right of all peoples to self-determination, by which they have the right to "... freely determine their political status and freely pursue their economic, social and cultural development". Paragraph 2 of the same article allows for the free disposal of their natural wealth and resources based upon the principle of mutual benefit and international law. Such disposal is stated to be "without prejudice" to obligations arising out of international economic cooperation, but it is clear that such obligations cannot be used to give a greater benefit to one side than the other. The formulation and implementation of policies in the arena of international trade, investment and finance therefore must not lean in favour of only one group of countries or institutions or organizations, at the expense of another. The UDHR emphasizes that there must be mutuality of benefit - a caution that is particularly relevant to societies within economically weaker countries that are more vulnerable to the dictates of MLIs and other powerful international State and non-State actors.

16. Article 2 of the Universal Declaration invokes the principle of non-discrimination "of any kind" on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The equality of all peoples is a fundamental principle on which the formulation of any policies of international trade, investment and finance must be constructed. Indeed, numerous other instruments including the Convention on the Elimination of All Forms of Discrimation against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, explicitly invoke the principle of

non-discrimination derived from the UDHR in order to ensure that such categories of people are not treated in a different and manifestly discriminatory manner.

17. Article 29.1 stipulates that "everyone has duties to the community in which alone the free and full development of his personality is possible". The question of duties - as a corollary of human rights - has found expression in numerous other instruments, with the objective of ensuring that tyranny is avoided and that a holistic view of a society which recognizes its responsibilities is maintained. 8/ Finally, with respect to the UDHR, article 30, the last article in this instrument, declares: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein".

18. Each of the Covenants in the International Bill of Rights has several provisions that are of relevance to the issue under consideration. In the ICESCR we can cite both the processual provisions such as article 1 (on equality) and article 5 (destroying or limiting the rights in the instrument) and those on substantive rights, including article 6 (right to work), Article 7 (just and favourable conditions of work), article 8 (trade union rights) and articles 9 (social security), 11 (adequate living standards), 12 (health), 13 (education), and 15 (culture). The formulation of policy on international trade, finance and investment must ensure not only that it meets the processual requirements outlined in the Covenant, but that it also does not offend the substantive provisions thereof.

19. The ICCPR also has a number of provisions that come into play in this discussion. Among them are article 6 (the right to life), article 19.2 (freedom of expression), article 22 (freedom of association) and article 25 (partaking in public affairs). There is no doubt that the adoption of wrong policies on trade, investment and finance at the international level has implications for the right to life. Furthermore, the creation of exclusive zones of economic activity (so-called "exclusive protection zones") in which trade union activity is often prohibited or severely proscribed affects the rights to free association, expression and assembly, to mention a few. 9/ Article 25 articulates the right to participate in the political affairs of the State. Although its concern is primarily with the relationship between the individual and the State, 10/ the "right to participate" (particularly

with respect to matters concerning development) has over time been expanded to encompass the obligations of non-State entities like MLIs and development agencies. 43/ Indeed, in many respects inattention to the right to participate is the cause of flawed and discriminatory policies that have adverse human rights consequences.

20. A particularly important instrument for the discussion of the area of international trade, finance and investment policy and human rights is the Declaration on the Right to Development. 44/ This instrument is especially useful in that it adopts an approach that looks at both categories of human rights, as well as at the situation of both the individual and the State. 45/ Article 3 of the Declaration describes the primary responsibility of States for the creation of national and international conditions favourable to the realisation of the right to development, while paragraph 3 of the same article imposes a duty of cooperation in ensuring development and in eliminating the obstacles to development. If development is viewed as a process of expanding the human rights and freedoms that people enjoy, then the formulation and implementation of policies governing international trade, investment and finance must not lead to their contraction.

21. Article 4 also imposes a duty on States individually and collectively to "... formulate international development policies with a view to facilitating the full realization of the right to development". At a minimum, even those institutions that do not profess to be engaged directly in the promotion or protection of human rights, do profess adherence to the right to development. 46/ Viewed critically, the right to development is the amalgamation of all human rights, even if there is some disputation over the Declaration's practical importance and effective application. 47/ Although the Declaration only refers to States, institutions involved in the formulation of international trade, investment and finance policy must pay due attention to the instrument. In the same way, the 1974 Charter of Economic Rights and Duties of States provides a broad framework for consideration of the basic obligations that both States and non-State actors have under the international system. 48/ Article 2.2 (b) clearly states that, "Each State has the right ... to regulate and supervise the activities of transnational corporations within its national jurisdiction ... Every State should ... cooperate with other States in the exercise of [this] right." 49/

22. Under the aegis of the United Nations Development Programme (UNDP), the notion of Sustainable Human Development (SHD) has gained in prominence in the debate about development. 50/ Through its annual Human Development Report (and initially through its Index on Human Freedoms), the UNDP has sought to promote a more holistic view of human progress which does not focus primarily on the economic dimensions of growth. Its 1998 publication, which attempts to integrate the discussion on SHD with human rights, is the first attempt by an intergovernmental agency to seriously address the issue. Any formulation of international policy on finance, trade and investment must seriously consider the implications for SHD.

23. The status of labour rights is significantly implicated in any discussion of policy and practice relating to international trade, investment and finance. The ILO in its conventions and recommendations has formulated the basic standards governing the area. Among the most important are conventions ensuring freedom of association, ensuring the right to form trade unions and to negotiate terms and conditions of employment, protecting children and women, prohibiting forced labour and protecting the environment. 51/ These conventions provide binding principles and standards for the protection of labour and need to be observed seriously in the formulation of policy with regard to international trade, investment and finance.

24. Aside from the ILO conventions, a number of international organizations - the OECD, UNCTAD and the World Bank among them - have all variously addressed the issue of labour standards. 52/ The critical issue is the extent to which a human rights approach is adopted by these organizations towards the matter, and the extent to which the standards articulated conform to those adopted by the ILO.

25. The 1990s have been a period in which a number of important world conferences have been held, commencing with the United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992; the World Conference on Human Rights held in Vienna in 1993; the World Summit for Social Development held in Copenhagen and the Fourth World Conference on Women held in Beijing in 1995; and the United Nations Conference on Human Settlements (Habitat II) held in Istanbul in 1996. The declarations emanating from those conferences have particular relevance to the issue presently under discussion because they represent broadly articulated international consensuses on the

place of human rights within international relations and the obligations of States towards ordinary people. Furthermore, being conferences organized under the auspices of the United Nations, the implications for States, United Nations agencies, MLIs and TNCs are significant. The breadth of the issues covered by the conferences is also quite wide. A broad review of each of the declarations demonstrates that MLIs and TNCs are in many instances both the subjects and the objects of the issues covered therein. In the formulation of international trade, investment and finance policy, MLIs (and TNCs) would do well to ensure that those provisions of the declarations that have implications for their operations are duly considered.

26. Each of the major regional blocs of the world, with the exception of Asia, has a human rights instrument that articulates principles and standards of application that are of relevance to the human rights dimensions of international trade, investment and finance. Specific reference can be made to the European context - the regional bloc within which the OECD is situated - where the debate on the MAI was conducted. A Social Charter accompanies the primary instrument in the region (the European Convention on Human Rights). The latter has a number of provisions that should be taken into account when the members of organizations like the OECD or the European Union attempt to formulate policies on international trade, investment and finance. The same applies to the Americas where a greater percentage of the investors who are the subject of analysis are resident. Despite the absence of a similar regime in the Asian context, organizations such as the Asia Pacific Economic Cooperation (APEC) and the Association of South East Asian Nations (ASEAN) would do well to recall the human rights obligations imposed by international law. 53/ Finally, the African Charter on Human and Peoples' Rights has several provisions that address the issue of development and human rights, including articles 21 (free disposal of wealth), 22 (development) and 24 (environment).

III. CRITICAL MULTILATERAL AND REGIONAL INSTITUTIONS

27. The institutions besides TNCs of most critical concern to the area can be divided into two broad categories, viz., those concerned with the formulation of policy on international and regional trade, and those which have a brief that covers international investment and finance. In the area of international trade, mention must be made of the World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD), and

even the World Intellectual Property Organization (WIPO) 54/ and the United Nations Commission on International Trade Law (UNCITRAL). Other intergovernmental agencies are invariably concerned with the issue, including the ILO and UNDP, the latter particularly because of the SHD dimensions involved. 55/ Several regional and bilateral contexts for trade, investment and finance including, inter alia, NAFTA, 56/ APEC, 57/ ASEAN, 58/ the EU, 59/ the Common Market of Eastern and Southern African States (COMESA) and the Economic Community of West African States (ECOWAS), are also relevant. 60/

28. It is important to recall that more non-State actors (including TNCs) are beginning to recognize the importance of human rights principles to the work that they do. 61/ This explains why, to mention one example, notions drawn from the field of human rights recently appear to have gained some favour amongst official aid agencies, albeit, as yet, still only indirectly. The attention currently being paid to concepts such as "good governance", "participatory development", "promoting democracy", and "strengthening civil society", is indicative of this general trend. 62/ The human rights responsibilities of MLIs and TNCs do not arise simply because they are critical actors in the development and execution of policies but because (particularly with respect to the former) they are also collectives of States. Secondly, as we approach the close of the millennium, MLIs have become more prominent in the linkage of the concepts of human rights, development and poverty, although a gulf still remains in several different respects. Indeed, as Roger Riddell observes of the view from the "field", "... there is little evidence to suggest that in practice this perspective is driving their aid and linked interventions". 63/

29. With regard to the area of international finance and investment, the main organizations of concern are the Bretton Woods organizations, comprising the International Monetary Fund (IMF) and the World Bank. 64/ Although these institutions have come some way from outright rejection (characteristic of their position in the 1960s and 1970s) of the applicability of human rights standards to their operations, they still adopt a rather ambivalent approach to the notion of human rights. 65/ Thus, they selectively apply certain aspects and leave out others. 66/ In a paper on democracy and development, the General Counsel of the World Bank, Ibrahim Shihata, presents the classic

justification for why the Bank should not be pushed too far in the concern for issues that may be considered outside its mandate, among which human rights are regularly included:

> "There is the need to honour the charter of each organization and to respect the specialization of different international organizations as reflected in the statutory requirements of their respective charters. Such is the case, in particular, with the charters of specialized UN agencies, such as the World Bank, which delimit the mandate of each organization." 67/

30. "Honoring the charter" of the World Bank is thus placed above any international obligations which the Bank may have by virtue of membership in the United Nations family. Such an approach could imply that any action permitted by the Bank's charter may appropriately be pursued regardless of the adverse human rights or other consequences that may result or the fact that it may offend the Charter of the United Nations or the Universal Declaration of Human Rights.

31. Under the presidency of James Wolfensohn, the Bank has sought to distance itself somewhat from the supply-side economic policies favoured in the 1980s and early 1990s. 68/ More attention is being paid to social safety nets, enhancing the ability of countries to provide basic education and health care, and the notion of "good governance". In 1998, the Bank published a report entitled, Development and Human Rights, 69/ in which it for the first time lays out the Bank's position on the kinds of human rights it is supposed to foster, the relationship between governance and development, equality and development and the protection of vulnerable groups. This is a welcome development and its translation into concrete action is awaited, particularly in light of the operations of the IMF.

32. The role of the IMF has even more serious implications for the observance and protection of human rights in the area of international financial policy, especially since it has imposed provisions in its loan agreements ("conditionality") and bailout packages that are very similar to those found in the MAI. The IMF's role has been critical in the application of structural adjustment programmes (SAPs) which, according to the independent expert of the Commission on Human Rights, on the effect of SAPs on the full enjoyment of human rights, have two distinct (and generally adverse) impacts at the economic and political levels. 70/

33. Ironically, the Articles of Association of the IMF do not have a bar similar to that invoked by the World Bank whenever the issue of human rights is pursued in a direction found uncomfortable. 71/ Paradoxically, the Fund is even more adamant that its operations have nothing to do with human rights, and its methods of work amply demonstrate this. 72/ Some observers have nevertheless pointed to a "changed stance" on the part of the IMF which, under pressure from organizations like UNICEF and some States, has begun to discuss the distributional aspects of its policies with a view to the protection of the well-being of vulnerable groups. 73/ Nevertheless, even those who have observed such changes come to the conclusion that the "hard core" of IMF programmes has remained largely intact, with a "... focus on measures that tighten domestic credit, enhance fiscal revenues, reduce government expenditures, and adjust the exchange rate" 74/ The principal problem with the "honouring the charter" or "privileging the Articles" approach to the issue is that it subordinates the international human rights instruments to the charters of the agencies in question when, as a matter of law, the reverse should be the case. Human rights obligations emanate from the Charter of the United Nations and the Universal Declaration, and have come to represent a standard that in over 50 years of existence signifies a holistic approach to the human condition.

34. Concerning the area of international trade policy formulation, much of the attention in the aftermath of the MAI debacle has shifted to WTO. Many observers view WTO as the most logical area in which to conduct future debate on a multilateral investment arrangement, although a growing lobby against such a proposal is already coalescing. 75/ Responding to this challenge, the WTO's Working Group on the Relationship between Trade and Investment recently produced an extensive report outlining the major issues of concern, and also touching on some of the controversies raised by the MAI. 76/ The Working Group has determined that there is no right to invest under customary international law, and that investors' rights are essentially the result of international treaties. 77/ The Working Group has also addressed the standard of National Treatment.

35. Significant questions nevertheless remain as to the appropriateness of WTO as a negotiating forum on account of the inequality of bargaining strengths between members and the automatically binding character of all WTO treaties once ratified, accompanied by the drastic measures imposed for

non-compliance. 78/ WTO also suffers from one of the major problems that afflicted the MAI process in the OECD - the absence of a framework for incorporating civil society and other third-party participation in its deliberations. Finally, although the Working Group stipulated that any discussions on investment agreements in WTO should consider the "development impact", this by no means confirms that the perspective adopted will be a rights-sensitive one. 79/ It is instructive to note that the report makes no reference to the Declaration on the Right to Development, let alone to any other human rights instrument. Furthermore, none of the human rights treaty bodies nor the Office of the High Commissioner for Human Rights (OHCHR) appears to have made any contribution to the deliberations.

36. It is apparent that multilateral institutions like the Bank, the IMF and WTO need to be continuously reminded of the human rights obligations established by international law. 80/ To borrow from Asbjørn Eide, these comprise the obligations to "respect", "protect" and "fulfil". 81/ But more importantly, MLIs must also respect and apply those standards to their own internal processes of policy formulation, or else those obligations cease to be of any import. This raises major issues of accountability, 82/ transparency and inclusion - issues that came to the fore in vivid and dramatic fashion in the negotiations over the MAI.

IV. THE MAI PROCESS AND SUBSTANCE: A BROAD RESUME

37. Given the eventual outcome of the MAI, it is unnecessary to provide a blow-by-blow examination of the Agreement originally envisaged in the Sub-Commission resolution. 83/ Instead, we focus here on the broad human rights issues raised by the processual and specific substantive dimensions of the MAI up to the point at which the negotiations were terminated. The discussion of the substantive provisions is with respect to the MAI negotiating text as it stood on 14 February 1998, 84/ in addition to an OECD Commentary of 24 April 1998. 85/

38. It is fairly clear that issues of process were as important (if not more so) in the MAI negotiations than those of substance, which explains its characterization by one observer as "multilateralism from above". 86/ The process that accompanied the negotiations raised numerous human rights issues. 87/ One could even say that the whole thrust of the process was grounded in an ideological conception that was antithetical to all the well-known tenets of human rights law. Among them we could speak broadly

about issues of transparency, accountability, participation and good governance. The process further raised questions concerning the liability and responsibility of multilateral actors (such as the OECD) for human rights observance and the protection and overall respect for the instruments. This is an issue of continual concern in relation to TNCs, and can also be applied to WTO, the IMF and the Bank. 88/ Such processual questions cut to the core of the right to participate - traditionally confined to the right to participate in government, 89/ but which must, given the phenomenal increase in the power and scope of operations of MLIs, be extended to cover them too. 90/ In the final analysis, these are processual questions that relate to the phenomenon we can best describe as "global governance". 91/ Put another way: What are the human rights duties and obligations of institutions that formulate policies that have a global impact, such as the OECD, the Fund or WTO?

39. As the principal agency behind the MAI, it is necessary to consider the role and function of the OECD. A grouping of 29 countries established in September 1961, it comprises the world's richest States, although a few middle-income States are also included. Its basic functions are to promote policies designed to:

(a) Achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

(b) Contribute to sound economic expansion in member as well as non-member countries in the process of economic development; and

(c) Contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

40. In pursuance of the above objectives, the OECD has developed many different processes intended to streamline its interventions, among which several have implications for human rights. In this regard the Development Assistance Committee (DAC) of the OECD is most relevant. In 1995, the DAC published guidelines entitled Participatory Development and Good Governance. Chapter IV of these guidelines is devoted to the issue of human rights. Paragraph 66 stipulates as follows:

"DAC members reiterate their adherence to the internationally defi[illegible] principles and standards contained in the UN Charter, the International Bill of Human Rights and other instruments, notably the

various UN Conventions which target particular human rights abuses such as slavery and torture, discrimination against women, or the protection of population groups such as children, refugees and migrants and the Conventions of the International Labour Organization concerning trade union rights. The 1993 Vienna Declaration on human rights reaffirms the universality and indivisibility of all human rights and fundamental freedoms, in accordance with the United Nations Charter. It also affirms the responsibility and duty of States to promote and protect human rights and fundamental freedoms. Human rights are at the same time a legitimate concern of the international community. Enhancement of international cooperation in the field of human rights is essential for the achievement of the purposes of the UN." 92/

41. Reading the above stipulation one would applaud the OECD for producing the most forthright statement of any multilateral agency on the extent of its obligations under the various human rights instruments. How then could the OECD have engaged in a negotiating process over the MAI that almost wholly negated the above stipulations, and indeed was thoroughly violative of a host of basic human rights principles?

42. The history of negotiations over the MAI date back to at least 1995, and have been described as having commenced and been conducted in an atmosphere of "intense secrecy", 93/ although this charge has been denied by the organization. Whatever the case, the February 1997 leaking of a draft of the negotiating text to a Canadian NGO spurred intense NGO activity against the MAI. The response of human rights groups (it must be noted) was somewhat belated - the labour, environmental and consumer-protection organizations having agitated against the treaty almost from the start. 94/ Nevertheless, as debate over the process intensified, human rights issues came to the fore. The failure of the OECD to respond adequately to charges that the process was not transparent and exclusive may not simply be a problem of public relations. It may also have been the outcome of continuous insulation of the institution from pressures of the kind presented by NGOs in their onslaught against the treaty, and of neglect by the OECD of the scope of application of basic international human rights principles as they apply to its operations. 95/

43. A number of additional points emerge from the processual dimensions of the debate over the MAI. The first is the forum in which the negotiating process took place, which requires us to revisit the manifestations of the

schemes and structures of multilateralism as they operated at the time. Although organizations like the OECD operate on a global scale, their membership, procedures and guiding philosophies do not actually present an image that can be described as either truly global or genuinely multilateral, except in the sense that they are not bilateral: both developing countries and non-governmental actors were excluded from the negotiating process. Second, the process had commenced with a lopsided focus, viz., the transfer of rules and principles from contexts and situations like NAFTA and the BITs (where the imbalance between the parties is not necessarily a serious factor) to a multilateral context in which, at least prima facie, there is equality of status. Finally, when placed against the backdrop of all the OECD's previous postures vis-à-vis respect for human rights and concern for social policy - from the DAC guidelines to the guidelines on MNEs - it smacked very much of double standards: do as I say, but not as I do. In other words, the concepts of inclusion, non-discrimination and equality that the OECD urges for others do not apply to the OECD itself. This has been a running critique of both multilateral institutions like the World Bank and the IMF, and of Governments which espouse doctrines like free trade but enforce the dictum in only one direction.

44. Concerning substantive matters, the MAI can be criticized both on the basis of the general and the specific. Regarding the former, the MAI sought to boost significantly the rights of investors without introducing any countervailing obligations. In short, its vision conceptually privileged the "rights of investors" while negating investors' responsibilities to the individual or the State. Secondly, the treaty proposed to place fairly extensive restrictions on domestic activity with regard to investment, which would amount to the imposition of serious limitations on the sovereign ability of States to respond to domestic concerns, including those in the areas of labour, the environment and human rights. In this way, States faced the danger of being transformed into the handmaidens of investment as opposed to protectors of the people - their primary human rights obligation - and in the process forced to contravene or to relegate to a secondary position the obligations contained in a host of international human rights agreements. Lastly, the dispute resolution and expropriation provisions respectively

raised concerns about the lack of transparency and the imposition of unjustifiable restrictions on host countries' freedom of action in the interests of development. 96/

45. The human rights issues raised by the MAI relate to four broad areas of the Agreement: the clause on National Treatment; Performance Requirements; the Dispute Resolution mechanism; and the provision on Expropriation. The clause on National Treatment would require States to grant foreign investors no less favourable treatment than they accord their own investors, thereby prohibiting State protection and promotion of local enterprises or economic sectors. 97/ Such measures could lead to a downgrading of the protections afforded to labour as countries would compete to provide more attractive foreign investment incentives in a "race to the bottom". The MAI prohibits the introduction of "performance requirements" such as the transfer of technology and the setting of levels of use of local raw materials, human resource development and employment conditions. 98/ The provision omits any reference to subjecting investors to any of the current or future environmental, human rights, labour and other regulations that countries may wish to implement. 99/

46. In relation to the envisaged dispute resolution mechanism in the MAI, investors are permitted to bring a cause of action against Governments and to seek monetary compensation in the event that a governmental policy is deemed to violate investors' rights as established in the Agreement. However, there is no reciprocal affirmative right for States to take investors before an international tribunal. 100/ Moreover, the MAI did not provide a mechanism for "screening" claims which could have a dampening effect on a Government's desire to implement or maintain domestic regulatory laws concerning, inter alia, human rights, protecting indigenous peoples, enforcing the right to a healthy environment and protecting labour rights. Finally, the Expropriation provision in the MAI was overly broad, failing to provide adequate definitional boundaries to protect reasonable State action in the public interest, and virtually prohibiting a contacting State from introducing measures to improve its regulatory framework which may affect investors' operations. 101/

47. To conclude, the MAI as it stood at the termination of negotiations in December 1998 ignored several dimensions of a State's affirmative obligations to respect, promote and protect human rights. Investment cannot be promoted

at the expense of the healthy growth of the human being, or of sustainable human development. Economic growth and liberalization should not occur at the expense of governmental power to protect all persons within its territory. Human rights are often best guaranteed by strengthening governmental power to protect resources and the human rights of all persons resident within the territory of a State. Additionally, it could be said to amount to a violation by the respective member States of the OECD of the obligations to respect, protect and fulfil international human rights standards. The processual aspects through which the draft treaty was conceived, elaborated and eventually debated confirm the worst for those fearing a globalized world in which the benefits of development are localized in the hands of a powerful coterie of economic actors, excluding the vast majority of humankind. In form and in substance, the MAI represented the ultimate negation of all the basic principles of fundamental international human rights.

V. CONCLUSIONS AND RECOMMENDATIONS

48. Several conclusions and recommendations emerge from the above discussion. It is quite clear that the question of integrating human rights concerns into the discussion on trade, investment and finance policy is a difficult issue and requires more comprehensive examination. Such a process must commence with the critical involvement of the two entities of the United Nations system concerned with the matter. This must include those bodies familiarizing themselves with the issues on both sides of the conceptual divide. It is especially essential for the treaty bodies to begin to address themselves to those aspects of the issue that relate to their respective mandates, i.e. the impact of multilateral policies on trade, investment and finance on women, children, minorities, indigenous peoples and vulnerable communities of various kinds. In short, we are calling for the establishment of mechanisms by which to carry out appropriate human rights impact assessments of the effects of the implementation of policy decisions made in multilateral and intergovernmental organizations. 102/

49. Secondly, there is a need for the processes by which policy on international trade, investment and finance is discussed to be opened up, first and foremost, to all States that make up the family of nations; it must also be made fully accessible to non-State actors. MLIs and intergovernmental agencies, including the OECD, WTO, the IMF and the World Bank, need to more critically address the issue of the "right to participation" in formulating

policy in the area of international trade, investment and finance. Indeed, the suggestion that such organizations need themselves to be guided by a code of conduct for their operations should be seriously considered. 103/ This obviously raises the additional question of both the necessity for a multilateral arrangement on investment, and the appropriate forum in which negotiations over the issue should take place. These are intricate questions that require deeper study and further consultation.

50. Thirdly, The Sub-Commission must remain seized of this matter and proceed to a more in-depth study that in the first instance reviews the more specific aspects of the relationship between trade, investment and finance policy and practice and human rights. It must elaborate a guiding framework in which a more rights-sensitive approach to the issue can be adopted, taking into account the several dimensions discussed in this study. In other words, the Sub-Commission should outline in greater detail the basic human rights principles on which an alternative multilateral regime governing international trade, investment and finance should operate.

51. Fourthly, steps must be taken to advance the processes of improving and implementing the OECD guidelines on MNEs, and reviving and discussing the enforcement of the United Nations Code of Conduct for Transnational Corporations. Such measures must ensure that there is an appropriate balance between the objective of facilitating enhanced investment and establishing a solid human rights-based framework for the operation of TNCs. 104/

52. Fifthly, all the treaty bodies and other institutions concerned with human rights must intensify their respective scrutiny of the processes taking place in the various multilateral institutions and the intergovernmental organizations that are involved in the matter.

53. Finally, in view of the complex and wide-ranging scope of the issues raised in the relationship between trade, investment and finance policy and practice and the observation and protection of human rights, it would seem appropriate that a preliminary but substantial report be submitted to the Sub-Commission at its fifty-second session in 2000. After the Sub-Commission has discussed the preliminary report, a progress report can be prepared for the next session, in the light of comments and recommendations received.

Notes

1/ This working paper has benefited from the work of students attached to the Human Rights Program at Harvard Law School, Cambridge, Massachusetts, United States of America. See, Harvard Human Rights Program, "The Multilateral Agreement on Investment: Advocacy History and Prospects for the Future", (May 1999) (hereinafter referred to as "HRP Paper"). The authors particularly thank Peter Rosenblum, Laurie Sickmen and Angela Wu. David Weissbrodt of the University of Minnesota Law School, Marci Hoffmann of the School of Law at Georgetown University and Tuaka Awori of Associates for Change (AFC) in Kampala, Uganda, are thanked for their support in accessing materials crucial for the research.

2/ The OECD is a multilateral institution established in 1961 and presently made up of 29 members with a secretariat in Paris. See "About OECD", at http://www.oecd.org/about/general/index.html, accessed on 7 May 1999.

3/ The accounts of why the process halted are varied. See, inter alia, Stephen Kobrin, "The MAI and the Clash of Globalizations", Foreign Policy, 97-109 (Fall 1998); James Davis and Cheryl Bishop, "The MAI: Multilateralism from above", 40 Race and Class, 159 (1998/99).

4/ For a good discussion of the origin and contemporary status of BITs, see, Christopher N. Camponovo (Comment), "Dispute Settlement and the OECD Multilateral Agreement on Investment", UCLA Journal of International Law and Foreign Affairs, 181, 190-194 (1996), and Kenneth J. Vandevelde, "The Political Economy of a Bilateral Investment Treaty", 92 American Journal of International Law, 621 (1998).

5/ Initial designs were to negotiate an international investment treaty in the WTO. Treaties like NAFTA already incorporate aspects similar to those that raised contention in the MAI process. See, Magda Shahim, "Multilateral Investment and Competition Rules in the WTO: An Assessment", 6 Transnational Corporations, 171 (1997), and Helene Bank and Yash Tandon, "Multilateral Agreement on Investment (MAI): A Shift in OECD Strategy", 7 Southern & Eastern African Trade, Information and Negotiations Initiative (SEATINI) Bulletin, 3 (15 October 1998).

6/ MLIs have not received much attention in the debate about designing human rights frameworks to govern their operations but TNCs have - from both the United Nations with its Code of Conduct and from the OECD.

7/ See, Marc W. Brown, "The Effect of Free Trade, Privatization and Democracy on the Human Rights Conditions for Minorities in Eastern Europe: A Case Study of the Gypsies in the Czech Republic and Hungary", 4 Buffalo Human Rights Review, 275, 279 (1998) (discussing the link between free trade and human rights, and its impact on the so-called "Gypsies" (Romany people) of the two countries). But also see Communication from the Republic of Korea to the WTO Working Group on the Relationship between Trade and Investment dated 30 March 1999, document No. WT/WGTI/W/69, arguing that Korea places its hopes for recovery on a "substantially liberalized FDI regime" as well as liberalization measures in the context of IMF adjustment programmes.

8/ Dirk Messner, "Towards a New Bretton Woods: Globalization and the Challenges Facing Politics", Development and Cooperation, 4 (1999).

9/ See, Martin Khor, "The Economic Crisis in East Asia: Causes, Effects, Lessons", El Taller: International Conference and General Assembly on the New Millennium: Globalization and its Challenges, Tunis, 12-16 November 1998, and Robert Wade, "The Asian Crisis and the Global Economy: Causes, Consequences and Cure", 97 Current History, 361-373 (November 1998).

10/ World Trade Organization, "World Trade Growth Slower in 1998 After Unusually Strong Growth in 1997", (Press Release of 16 April 1999 on WTO Webpage at: http://www.wto.org/wto/intltrad/intrtrad.htm). But the "tigers" were not the first to experience the effects of ill-conceived liberalization efforts. The "Southern Cone" countries of Argentina, Chile and Uruguay were affected in similar fashion in the late 1970s, with Mexico following suit in the 1980s. See, Stephan Haggard and Sylvia Maxfield, "The Political Economy of Financial Internationalization in the Developing World", 50 International Org., 35-68 (1996).

11/ See, Voravidh Charoenloet, Labour Standards in Thailand: The Impact of Trade Liberalization Programme for the Study of International Organizations (PSIO), Occasional Paper No. 2, Social Aspects of Trade Liberalization Series, 7-8 (1997), and UNCTAD, Trade and Development Report, 72 (1998) (detailing the social consequences of the Asian crisis).

12/ The World Bank makes some interesting observations on the Asian crisis although it tends to cast all the blame onto the failure by the affected Governments to establish appropriate mechanisms without making any mention of the contribution of the policies of the Bank or the IMF to the crisis. See, International Bank for Reconstruction and Development/World Bank, Development and Human Rights: The Role of the World Bank, 17-18 (1998).

13/ Kevin Watkins, The Oxfam Poverty Report, 109-110 (1995).

14/ Ibid.

15/ UNCTAD, op.cit., note 11 76.

16/ See, Robert Wade and Frank Veneroso, "The Gathering Support for Capital Controls", 41 Challenge, 14-26 (1998).

17/ See, for example, Sub-Commission resolution 1998/14 and José Bengoa, "The relationship between the enjoyment of human rights, in particular economic, social and cultural rights, and income distribution", (E/CN.4/Sub.2/1998/8).

18/ See the interesting discussion by Roger Riddell on the link between development (or the lack thereof) and conflict. Roger Riddell, Minorities, Minority Rights and Development: An Issues Paper, Minority Rights Group, 28-31 (November 1998).

19/ See, for example, Lawyers Committee for Human Rights and Institute for Policy Research and Advocacy (ELSAM), In the Name of Development: Human Rights and the World Bank in Indonesia (1995).

20/ Paragraph I.5, Vienna Declaration and Programme of Action, (A/CONF.157/24 (Part I)), Chapter III.

21/ See, generally, Charoenloet, supra., note 12, 20-22, and 25-27 (on child labour and the situation of migrant workers), Michele Sforza, "Globalization, the Multilateral Agreement on Investment, and the Increasing Economic Marginalization of Women", Preamble Centre (at http://www.preamble.org/MAI/womfin.html), and Riddell, op.cit., note 19.

22/ See, for example, Nimalka Fernando, "Women and Globalisation" in Globalization and Discrimination, 95 (International Movement Against All Forms of Discrimination and Racism (IMADR), eds., 1998), and Sforza, ibid., 4-5.

23/ Charoenloet, op.cit., note 11, at 20-22.

24/ See, Marc Brown, op.cit., note 7, at 294-295 and 299-312.

25/ Attempts have been made but their impact has not been widespread. For examples, see, inter alia, Human Rights Council of Australia, The Rights Way to Development, and James Paul, "Incorporating Human Rights into the Work of the World Summit for Social Development", Issue Papers on World Conferences, No. 3 (American Society of International Law, Washington DC, February 1995).

26/ Because the issue of TNCs and their obligations under human rights law is under consideration in various other Sub-Commission studies, our focus here is mainly on MLIs.

27/ See, Amnesty International and Pax Christi (Dutch Sections), Multinational Enterprises and Human Rights (1998).

28/ Committee on Economic, Social and Cultural Rights, "Globalization and economic, social and cultural rights", statement made on 11 May 1998.

29/ Philip Alston, "The Universal Declaration in an Era of Globalization", in Reflections on the Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology, (Barend van der Heijden and Bahia Tahzib-Lie, eds.), 29 (1998).

30/ See Sub-Commission decision 1998/104.

31/ There are a host of differing views on what the term "globalization" actually means. Unfortunately, as Professor Anthony Giddens of the London School of Economics has pointed out, the majority emphasize only its economic manifestations. See, Anthony Giddens, "Runaway World", the 1999 British Broadcasting Corporation (BBC) Reith Lectures, located at: http://news.bbc.co.uk (accessed on 11 April 1999). Also see, UNDP, Human Development Report, 6 (1998). There is nevertheless general agreement that the global economy has changed dramatically over the last decade, with wide-ranging and fundamental impacts on human society.

32/ Committee on Economic, Social and Cultural Rights, op.cit., note 29, para. 3.

33/ See Kobrin, op.cit., note 3.

34/ As Kobrin somewhat ruefully notes: "The days of negotiating international treaties behind closed doors are numbered, if not over. A much broader range of groups will have to be included in the globalization debate, and much more thought will have to be given to how non-participants will interpret international negotiations and agreements", Ibid., 99.

35/ Ibid.

36/ See further, Ian Brownlie, Principles of Public International Law, 573-575 (1998).

37/ These would include instruments such as the European Convention on Human Rights and the Social Charter, the InterAmerican Convention on Human Rights and the African Charter on Human and Peoples' Rights. See also the African Charter for Popular Participation in Development and Transformation (United Nations document E/ECA/CM/16/11 (1990)).

38/ See also Pierre Sané, "The New Challenges of Inequality", Label France, 25 (1998).

39/ Danilo Türk, "Development and Human Rights", in Human Rights: An Agenda for the Next Century (Louis Henkin and John L. Hargrove, eds.), 167, 168 (1994).

40/ For good discussions of the issue of duties in international human rights law, see, International Council on Human Rights Policy, Taking Duties Seriously: Individual Duties in International Human Rights Law (1999), and Makau wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties", 35 Virginia Journal of International Law, 339 (1995).

41/ See Friends World Committee for Consultation (Quakers), "Sharing Responsibility for Labour Standards and Trade Liberalisation", 31-35 (Report of a seminar and workshop, 3-8 October 1997). See also, John Eremu, "Uganda Warned on EPZ Strategy", New Vision, 7 December 1998, 54 (pointing out that EPZs in many African countries are characterized by long working hours, compulsory night shifts, job insecurity, poor pay, and child labour).

42/ See, Henry J. Steiner, "Political Participation as a Human Right", Harvard Human Rights Yearbook, 77 (1988).

43/ See, Celia R. Taylor, "The Right of Participation in Development Projects", 13 Dickenson Journal of International Law, 69 (1994).

44/ General Assembly resolution 41/128 of 4 December 1986.

45/ See, Preamble and articles 1, 2 and 6.

46/ Indeed, following the Vienna Declaration and Programme of Action, "... the right to development gained a stronger status". See, Danilo Türk, "The Right to Development", Interights Bulletin, 43 (1998/99).

47/ See, Riddell, op. cit., note 18, p. 6.

48/ General Assembly resolution 3281 (XXIX), of 12 December 1974.

49/ Ibid., article 2.2 (b).

50/ J. Oloka-Onyango, "Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa", 26 California Western International Law Review, 29-34.

51/ See, Sumner M. Rosen, "Protecting Labour Rights in Market Economies", 14 Human Rights Quarterly, 372-373 (1992).

52/ See, for example, OECD, Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade (1996).

53/ An interesting document has recently emerged from a coalition of human rights NGOs in the Asian region. The degree to which it will feature in ongoing efforts by Asian countries to arrive at a regional human rights instrument is unknown. See, Our Common Humanity, Asian Human Rights Charter (1999).

54/ The issue of intellectual property rights (IPR) is fundamental to so many of the tensions involved in contemporary debates about globalization, trade/investment and human rights, although the extent to which WIPO has directly addressed human rights questions (as opposed to those related to development) is questionable. See, Ruth L. Gana, "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property", 24 Denver Journal of International Law and Policy, 109-144 (1995), and Stefania Ercolani, "The OECD Multilateral Agreement on Investment (MAI) Project: The Possible Consequences of Including Intellectual Property", 9 Ent. L. Rev., 125 (1998).

55/ UNDP has recently taken some steps in an attempt to marry the concept of SHD to that of human rights. See, UNDP, Integrating Human Rights with Sustainable Human Development (1998).

56/ Currently there is a process of negotiation in the Americas to create a free market system within the framework of the Free Trade of the Americas Agreement (FTAA), which has a tentative deadline of 2005. Several of its investment provisions differ in significant ways from the MAI.

57/ M. Sonarajah, "Protection of Foreign Investment in the Asia-Pacific Economic Co-operation Region", 29 Journal of World Trade, 105, 123-125 (1995).

58/ See, Charoenloet, op. cit., note 11, 26-27.

59/ See, Thomas W. Waelde, "International Investment Under the 1994 Energy Charter Treaty", 29 Journal of World Trade 5 (1995), and Michael D. Sandler, "Report on the Multilateral Agreement on Investment to the American Bar Association (ABA)", 31 International Law, 205 (1997).

60/ Other regional agencies that are relevant to this issue are the regional development banks - the Asian Development Bank, the African Development Bank, the Inter-American Development Bank and the European Bank for Reconstruction and Development. Of the four, only the last (created in 1990) departs from the World Bank position on human rights, with an explicit provision that compels the Bank to take human rights principles into account in its transactions. The charter of the EBRD conditions assistance on, inter alia, a country's commitment to and application of "the principles of multiparty democracy, pluralism and market economics". See art. 1, Agreement Establishing the European Bank for Reconstruction and Development (29 May 1990).

61/ See, David Weissbrodt, "Transnational Corporations and Human Rights", paper given at the fiftieth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 3 August 1998, and Amnesty International and Pax Christi, op. cit., note 27, 45-54.

62/ P. Osodo and S. Matsvai, Partners or Contractors: The Relationship Between Official Agencies and NGOs: Kenya and Zimbabwe (1998).

63/ See Riddell, op. cit., note 18, p. 35.

64/ A sister Bretton Woods organization of relevance is the International Centre for the Settlement of Investment Disputes, which is important on account of its experience as a forum for Government-investor litigation - an issue that was central to the concern over the MAI provisions.

65/ For a good background to the place of human rights in the World Bank, see, Lawyers Committee and ELSAM, op. cit., note 19, 13-33.

66/ The closest the World Bank has come to a human rights approach to its activities is through the issue of "good governance" which in the 1990s has led the Bank to become involved in certain aspects of civil and political rights. Problems still remain with this and other aspects of the Bank's position on human rights. See, Lawyers Committee for Human Rights, The World Bank: Governance and Human Rights: An Update, 35-38 (1995).

67/ Ibrahim Shihata, "Democracy and Development", 46 International and Comparative Law Quarterly, 635, 638 (1997).

68/ Op. cit., note 8.

69/ See, World Bank, op. cit., note 12.

70/ See, Report of the open-ended working group on structural adjustment programmes and economic, social and cultural rights, on its second session, 1-3 March 1999 (E/CN.4/1999/51), para. 11 (a), 3.

71/ Graham Bird, "The IMF and Developing Countries: A Review of the Evidence and Policy Options", International Organizations, 477-511 (1996).

72/ See, Balakrishnan Rajagopal, "Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights", 11 Boston International Law Journal 81, 93 (1993).

73/ Ibid.

74/ Ibid., 493.

75/ See, "Call to Reject Any Proposal for Moving the MAI or an Investment Agreement to the WTO", (Joint NGO Statement at http://www.citizen.org/pctrade/mai/html, accessed on 18 December 1998), and Bhagirath Lal Das, "Risks in Investment Negotiations", 7 Seatini Bulletin, 7-8 (15 October 1998).

76/ WTO, Report of the Working Group on the Relationship between Trade and Investment to the General Council, 8 December 1998 (WT/WGTI/2; 98-4920, accessed at: http://www.wto.org, on 20 May 1999.

77/ Ibid., 35.

78/ See, generally, Eric M. Burt (Note and Comment), "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization", 12 American University Journal of International Law and Policy 1015 (1997) (examining the essential elements of the MAI and considering the appropriateness of the WTO as a negotiating forum for an agreement).

79/ As the Committee on Economic, Social and Cultural Rights has pointed out, "Many activities undertaken in the name of 'development' have subsequently been recognized as ill-conceived and even counter-productive in human rights terms". General Comment No. 2, para. 7 (1990).

80/ See, para. 19, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).

81/ See, Asbjørn Eide, Right to Adequate Food as a Human Right, (United Nations publication Sales No. E.89.XIV.2).

82/ See, remarks by Daniel D. Bradlow on "The Accountability of International Organizations to Non-State Actors", 92 American Society of International Law Proceedings, 359 (1998).

83/ The most comprehensive analysis that we came across was that done by the group Public Citizen. See, Public Citizen (Global Trade Watch), "MAI Provisions and Proposals: An Analysis of the April 1998 Text", accessed at http://www.citizen.org/pctrade/MAI on 16 September 1998.

84/ Accessed at http://www.oecd.org/daf/cmis/mai/maitext.pdf on 6 December 1998.

85/ OECD, The Multilateral Agreement on Investment: Commentary to the MAI Negotiating Text (as of 24 April 1998).

86/ See, Davis and Bishop, op. cit., note 3.

87/ See, Milloon Kothari and Tara Krause, "Human Rights or Corporate Rights? The MAI Challenge", 5 Tribune des Droits Humains, 16 (April 1998).

88/ See, Amnesty International and Pax Christi, op. cit., note 27.

89/ See, Steiner, op. cit., note 42.

90/ As Jonathan Cahn points out, the World Bank is "... virtually immune from any form of accountability to those developing country citizens for whom the Bank plays its governance role. Bank decision-making is embedded in processes that make no accommodation for public participation and shielded from public scrutiny by Bank secrecy". Jonathan Cahn, "Challenging the New Imperial Authority: The World Bank and the Democratization of Development". 6 Harvard Human Rights Journal, 159, 160-161 (1993).

91/ See, Harlan Cleveland, Birth of a New World (1993).

92/ Development Assistance Committee (DAC) of the Organization of Economic Cooperation & Development (OECD), Participatory Development and Good Governance, para. 66, 23 (1995).

93/ HRP, op. cit., note 1, 2.

94/ See, Kothari and Krause, op. cit. note 87.

95/ See, International NGO Committee on Human Rights in Trade and Investment, Investment, Trade and Finance: The Human Rights Framework (Focusing on the MAI), 1 August 1998.

96/ See, HRP, op. cit., note 1.

97/ See, article III, para.1, clause 1; Negotiating Text, op. cit., note 85.

98/ See, generally, article III, para.8, clause 1, sub-clauses (b), (f), (j) and (k), ibid.

99/ HRP, op. cit., note 1, pp. 11-12.

100/ See, article V, Negotiating Text, op. cit., note 85.

101/ Ibid, article IV, para. 2.

102/ The notion of human rights Impact Assessments (HRIAs) as necessary elements in the design of policies is gaining acceptance in diverse forums. See, for example, para. 20, Communiqué of the Meeting of Commonwealth Law Ministers (7 May 1999), and the Declaration and Programme of Action (Vienna

Plus Five Review: Recommendation 4 of the Working Group on the Effectiveness of the UN System and NGO Access to the United Nations), in 5 Human Rights Tribune, 8 (1998).

103/ As one scholar has pointed out, it is essential that policy programmes that are the foundation of operational activities in international organizations be "... legitimized by democratic decision-making procedures". See, Volker Rittberger, "Democracy and International Organization", paper presented at the second meeting of the United Nations University Advisory Team on Peace and Global Governance, 9 (24-25 October 1994).

104/ See, Scott Leckie, "Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights", 20 Human Rights Quarterly 81, 114 (1998).

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Sub-Commission on Prevention of
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Fifty-first session
Item 4 of the provisional agenda

THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The right to adequate food and to be free from hunger

Updated study on the right to food, submitted by Mr. Asbjørn Eide in accordance with Sub-Commission decision 1998/106

GE.99-13813 (E)

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I. THE ISSUES AND THE MANDATE

The issues

1. The Commission on Human Rights has repeatedly affirmed 1/ that hunger constitutes an outrage and a violation of human dignity. The present update of my previous study on the right to adequate food 2/ is based on the conviction that the widespread failure by States and the international community to ensure freedom from hunger and enjoyment by all of the right to food constitutes one of the most serious shortcomings of the human rights agenda. The adoption of urgent measures is required at the national, regional and international levels for the elimination of hunger and the creation of conditions in which all people can enjoy their right to food and nutrition. Unless this is done, the credibility of the human rights edifice is in serious doubt.

2. There is no disagreement that the right to food and nutrition is a core human right. On the occasion of the 1998 World Food Day (16 October) the President of the United States, Bill Clinton, referred to the right to food as the most basic human right. Freedom from want was one of the four fundamental freedoms referred to by an earlier United States President, Franklin D. Roosevelt, in his famous "four freedoms" address in 1941, which sparked the preparation of the Charter of the United Nations and later the Universal Declaration of Human Rights. The States parties to the International Covenant on Economic, Social and Cultural Rights have recognized that freedom from hunger is a fundamental human right, and have undertaken to take the necessary steps, to the maximum of their available resources, to eliminate hunger.

3. And yet more than 800 million people do not have food to meet their basic nutritional needs. This is a frighteningly high number, and hard to reconcile with the expressed commitment by States to ensure the enjoyment of human rights by everyone. There is a vast task to be completed before everyone can enjoy this fundamental human right. It is necessary, therefore, to examine the existing gap between the human rights commitments and the reality of today.

The mandate

4. In its decision 1997/108, the Sub-Commission requested me to review and update my study on the right to food submitted in 1987 and published in 1989. It was the first Sub-Commission study to explore the nature and content of an economic and social human right, analysing the content of the right as well as clarifying the corresponding internal and international obligations of States in regard to economic and social rights. A progress report on the update was presented at the fiftieth session of the Sub-Commission (E/CN.4/Sub.2/1998/9), which focused on major trends in the food and nutrition situation and on major events in the promotion of the right to food and nutrition. The present report should be examined together with the 1998 progress report, since information contained there will not be repeated here.

5. Since the completion of the 1987 study, considerable developments have taken place at the international level. The adoption of the Convention on the

Rights of the Child and its near universal ratification considerably strengthened the place of the right to food and nutrition in international human rights law. A series of world conferences was held during the 1990s, starting with the World Summit for Children in 1990 and culminating with the World Food Summit in 1996. At nearly all of these, the problem of the extensive hunger and malnutrition in the world was addressed.

The outline

6. Chapter II of the present report describes the scope and consequences of malnutrition and hunger. The major purpose of that chapter is to create awareness of the seriousness of the situation. Recent scientific studies have led to the conclusion that the long-range consequences of malnutrition are much more serious than previously known.

7. Chapter III points out that the human rights issues are now taken seriously. Significant commitments were made at the World Food Summit in 1996, and special attention is given to the objectives set out its Plan of Action which calls for clarification of the right to food and the preparation of a coordinated strategy for its implementation. The follow-up is described leading up to the adoption on 12 May 1999 of General Comment No. 12 by the Committee on Economic, Social and Cultural Rights (annex). Chapter IV explores the interpretation of relevant human rights provisions with particular attention to article 11 of the International Covenant on Economic, Social and Cultural Rights, drawing on General Comment No. 12.

8. Chapter V discusses the steps to be taken by States in order to ensure freedom from hunger and to implement the right to food. It also gives two examples of country situations where efforts to develop a human rights strategy to food have been started.

9. Chapter VI examines the treatment of the right to food and nutrition by relevant treaty bodies, while chapter VII reviews the treatment of the right by the Commission on Human Rights and its special rapporteurs on country situations.

10. Chapter VIII examines the evolving roles of the specialized agencies and other bodies in regard to the right, and shows that there has been a great increase in support for a human rights approach to food and nutrition issues.

11. Chapter IX briefly examines the right to food in the context of ongoing processes of globalization, and points out that these processes have created new challenges and dangers as well as new opportunities; corrective action has to be taken in order to prevent avoidable negative consequences.

12. Chapter X contains the conclusions and the recommendations. Some of these are addressed to States with regard to their implementation of the right to food and nutrition within their jurisdiction; others are addressed to States with regard to their international obligations towards other States and to the population living in other States. Still others are addressed to the High Commissioner for Human Rights, to the treaty bodies, and to United Nations bodies and the specialized agencies.

II. MALNUTRITION AND HUNGER: DIMENSIONS, CONSEQUENCES AND EMERGING ISSUES

13. The scope of malnutrition and hunger is appalling in its magnitude and an outrage to the conscience of humankind. My 1998 progress report on the update contains statistics regarding malnutrition and provides a general overview of the nature and magnitude of nutrition related diseases. In the year that has passed since then some figures have been reconsidered and adapted, such as in the case of malnutrition assessed by underweight of children. I reported last year that around 178 million children under 5 years of age were considered underweight, while the most recent authoritative figure is put at "more than 200 million". 3/

14. The Director General of the World Health Organization recently gave the following examples of the impact of malnutrition on disease: 4/ 208 million people are stunted and 49 million are wasted; more than 900 million people suffer from goitre, 16 million are severely retarded and another 50 million suffer other forms of brain damage due to a deficiency of iodine, 1 million children are at increased risk of infection, blindness and death because they are vitamin A deficient; anaemia and iron deficiency affect more than 2,000 million people the world over, and some 22 million children and more than 200 million adults are obese, and thus at significant risk from a range of serious non-communicable diseases and other threats to health.

15. One can hardly say that the overall problem has improved much although there are some positive signs and trends in some parts of the world (see the 1998 progress report), and there are single-country experiences that may give hope to other States wishing to address the problem in a sustained manner. 5/

16. This final report highlights some of the most significant major new concerns and ways of understanding the causes of malnutrition as they have emerged since my study was submitted in 1987. Scientific evidence and practical experience over the last decade have converged on a much more integrated picture than we were able to draw in 1987. Only by understanding the nature and complexity of the problems stemming from the non-fulfilment of the right to adequate food, can we interpret this right more fully and identify the corresponding national and international obligations of States.

17. Inadequate access to food and suboptimal nutritional status may have multiple interacting causes, some of them deeply rooted in malfunctioning of the society. The previously widespread but erroneous notion that insufficient global and even national food production was the cause of hunger has now generally been discarded. There is greater recognition of the need for systemic and integrated analyses and approaches towards solutions. The translation from theoretical principles to practical action requires transcending the borders of single sectors and organizations with their often firmly established agendas and portfolios.

18. Three areas need particular attention: firstly, the new emphasis on the so-called "life-cycle approach" to understanding and addressing malnutrition; secondly, the revitalized associated understanding of the critical role of women and young girls as mediators of both societal and biological processes

leading to and perpetuating malnutrition between generations; thirdly, the rapidly changing distribution of the "global burden of disease" between the developing and the industrialized world as well as within the developing world. In addressing all of these concerns human rights ought to come into play, enforcing consideration of the "right to adequate food" in a very broad economic, social and human development perspective. 2/

The "life-cycle approach" to understanding malnutrition

17. The pernicious impact of malnutrition can affect the whole life span of human beings. This has now become obvious and makes it even more urgent to take wide ranging corrective measures. We know that poverty is a vicious circle and malnutrition may greatly affect work capacity in adults, thus contributing to the perpetuation of poverty. The irremediable impact of malnutrition on human, family and societal development is unimportable.

18. Until recently the effects of hunger and various forms of malnutrition were usually related to susceptibility at various age levels and remedies were considered in terms of the need to attack the problem at that stage through food supplementation or other forms of rehabilitation. Although there was always a discussion of the consequences of infant and young child malnutrition in terms of small, but otherwise healthy adults, as well as a certain undocumented fear of persistent brain damage from foetal undernutrition, it was only in the 1970s that new theories and evidence from long term studies led to the idea that early life malnutrition also affected susceptibility to disease in later life.

19. Findings and theories put forward during the present decade suggest that foetal and young infant malnutrition may in fact "programme" an individual for susceptibility to nutrition related chronic diseases in later life, such as heart diseases, obesity and diabetes. It is feared that these diseases, which were thought to be caused by "over-eating" in the industrialized world, are now sweeping the poor world with unprecedented speed. They imply disability, disease and death much earlier than expected for people who survived the critical years of childhood in poor societies. Furthermore, the risk factors which add to the biological programming effects are themselves frequently related to poverty. For example, certain fat and sugar foods are known to produce "cheap energy." 2/

20. The scope and gravity of this life-cycle malnutrition is closely related to adverse social and biological factors which may combine to influence the nutrition and reproductive performance of women in ways that may critically affect their offspring while still in the womb and have consequences for the life cycle of the next generation. The ACC/SCN report summarizes the seriousness of the complex interrelationships as well as follows:

> "The acceptance by the international community that poorly fed adults are economically less effective now needs to be linked to new findings of up to 1 billion adults who are malnourished, with a reduced work capacity and an enhanced susceptibility to infections. The remarkably high rates of anaemia in children, now and women in many parts of the globe not only impair work capacity but permanently damage the normal brain development of infants. Now, however, it is also clear

that the commonest form of 'childhood' malnutrition, involving stunted growth, is also closely linked to impaired mental as well as physical development. Thus, the capacity of societies to develop economically is being handicapped for decades by our current failure to eliminate malnutrition and anaemia in both children and adults. The impact of poor nutrition is therefore now seen as affecting the whole life cycle. Malnourished mothers, particularly in Asia, are producing low birth weight babies who are not only immediately at risk but also become stunted as young children, with a double handicap of physical and mental limitations. In some societies this affects half of the population, with new evidence that in Asia poorly growing girls grow into malnourished adults who then in pregnancy pass on the long term impact of their own poor development during foetal life to the next generation. To break this intergenerational cycle is exceptionally important - not only a fundamental ethical issue but also a priority for any Government concerned for the future intellectual and economic capacity of its people." (emphasis added)

The particular role of women and young girls as both victims and "mediators" in the generation of malnutrition

23. Women who are socially disadvantaged in ways that can affect their reproductive functions can contribute to a vicious circle: young girls are often underfed and mothers-to-be may start their early pregnancies in a nutritionally suboptimal state, giving birth to low-birth-weight children who may also have had suboptimal nourishment in the womb. Added to such a bad start in life may be inadequate feeding patterns and repeated infectious diseases in infancy and as a young child. These adverse factors may combine to affect vital human development processes, including brain development, in the most critical formative years.

24. Underfed and under-cared-for mothers are thus affected socially and biologically, demonstrating the need for a continuing gender-role analysis in all undertakings aimed at improving food and nutrition. This must in turn be seen in the context of responsibilities and rights of women, including those of young girls. We are faced with both an ethical imperative vis-à-vis women themselves, and an imperative to safeguard future generations from being exposed to the same mutually reinforcing risks and thereby further perpetuating the situation. The vicious circle must be broken.

25. The problem has been that women's chores - giving birth and nurturing the new generation, as well as seeing to household food and economic security overall, have too often been considered as belonging to the domestic sphere and therefore outside State responsibility. We have begun to understand better to what extent these chores are at the very heart of problems that, because they are often defined in aggregate terms, tend to be missed when identifying crucial points for intervention. Renewed consideration of the linkages between women's rights and the right to adequate food and feeding is warranted, in the context of the consideration of the systemic linkages between the processes that create poverty and the manifestation of poverty itself, and cultural factors resulting in discrimination against women.

26. A special case in point is women's opportunities for breastfeeding their children, thereby providing them with the most appropriate food for infants at least up to 6 months of age - human milk. The State has an obligation to respect women's right to provide this food and to protect and facilitate the necessary conditions for them to do so, at least for six months. This may require legislative and supportive measures protecting mothers from being forced to stop nursing or to shift to alternative food, including mothers' milk substitutes, before their infants' physiology has matured to a stage when they can tolerate and utilize food other than human milk.

The distribution of the burden of nutrition related disease

27. It is also clear from what has been said about the life-cycle approach that the picture we used to have of hunger, malnutrition and ill-health being caused by inadequate food intake - undernutrition in developing countries and "overnutrition" in the rich countries - has changed, and dramatically so. We find all the major nutrition-related diseases in most countries, and spread among social classes at that. This has led to the expression "the double burden of disease" to describe what poor societies now are experiencing. The typical diseases found in developing societies - above all infectious diseases which in combination with undernutrition lead to high mortality, especially among children - continue to take their toll and drain poor health budgets; in addition, the new diseases add to the drain in terms of early disability or loss of breadwinners. 8/

28. Especially intriguing is the finding of differential rates of malnutrition among women and young children in different developing societies. The most outstanding example is provided by a comparison of trends in South Asia and in sub-Saharan Africa. Women and young children in South Asia appear to be significantly worse off than in Africa. Several theories have been put forward to try to explain this without any firm conclusions having been reached. The lesson to be drawn, however, in assessing the nutritional status of populations is that the underlying causality is often much more complex than a single-factor explanation such as overall lack of food. And yet, adverse nutritional trends are all too often used to "demonstrate" the need for increased food production as the remedy. The "right to adequate food" may be as much a question of the full realization of the rights of women as of ensuring a bundle of nutrients handed over through food supplementation schemes.

29. To combat malnutrition is required not only from a human rights perspective; the case for nutrition is a strong one also in economic terms. James Lovelace, Director of the Health, Nutrition and Population Network of the World Bank, argues that development thinkers, planners and practitioners have for too long failed to recognize how, and how deeply, malnutrition is implicated in the genesis and persistence of poverty. "The pervasive malnutrition of children, and also of women and men, has surreptitiously undermined and frustrated development efforts in many fields. Nutrition should become the new frontier, attacking stunted development and compromised growth of people, especially the young." He also argued that we know how to solve the problem of malnutrition: "Carefully selected interventions and

approaches are not only a human rights imperative but make eminent economic sense as well. States and the international community cannot afford not to do so, because malnutrition is very expensive for society." 9/

30. Human rights arguments and economic arguments in favour of improved food and nutrition are thus both important and can live side by side, not being opposed to one another. The point is that the rationale for human beings to be well fed should not be perceived and advocated in economic terms alone the dignity of men, women and children must be superimposed on any mere utilitarian argument. Human rights pays off economically, and successful economic interventions will enhance the realization of human rights: these are two sides of the same coin and both can be promoted.

III. THE WORLD FOOD SUMMIT COMMITMENTS AND THEIR FOLLOW-UP

31. Notwithstanding the fact that the Universal Declaration of Human Rights places all human rights on the same level, the attention given at the international level to economic and social rights was appallingly low for several decades. One of the purposes of my 1987 study was to improve the understanding of economic and social rights and through that to advance their recognition and implementation. Significant advancement in the recognition and promotion of these rights was made through a series of important world conferences: the World Summit for Children in 1990, the United Nations Conference on Environment and Development (the Rio Conference) in 1992, the International Conference on Nutrition in 1992, the World Conference on Human Rights in 1993, the International Conference on Population and Development in 1994, the World Summit for Social Development in 1995, the Fourth World Conference on Women in 1995 and the second United Nations Conference on Human Settlements (Habitat II) in 1996. They constituted steps in a process towards a better understanding of the relationship between human rights and development, and a recognition that economic and social rights are as indispensable as civil and political rights. The contribution by each one of these conferences to economic and social rights has been outlined in my 1998 progress report (paras. 22-29), to which the reader is referred.

32. The major breakthrough with regard to the right to food came with the World Food Summit, held at the invitation of the Food and Agriculture Organization of the United Nations (FAO) in Rome in November 1996. Taking into account that the Rome Declaration on Food Security and World Food Summit Plan of Action was adopted by the Summit and thus by the leaders of the world, the commitments made there must be considered to have overriding legal, political and moral significance for the world community.

33. The Governments assembled in Rome declared that they considered it intolerable and unacceptable that more than 800 million people throughout the world, particularly in developing countries, did not have enough food to meet their basic nutritional needs. They recognized that this was not a result of lack of food supplies. They noted that such supplies had increased substantially. The constraints were to be found in the access to food. The problems, they noted, resided in the continuing inadequacy of household incomes to purchase food and the instability of supply and demand, as well as natural and man-made disasters.

34. They also pointed out that the problems of hunger and food insecurity had global dimensions and were likely to persist and even increase dramatically in some regions unless urgent, determined and concerted action was taken, especially given the anticipated increase in the world's population and the stress on natural resources. The leaders of the world therefore pledged their political will and their common and national commitment to achieving food security for all and to an ongoing effort to eradicate hunger in all countries, with an immediate view to reducing the number of undernourished people to half the 1996 level no later than the year 2015.

35. To implement this political will, the leaders of the world made the following seven commitments which were spelled out in the Plan of Action:

1. To ensure an enabling political, social and economic environment designed to create the best conditions for the eradication of poverty and for durable peace, based on full and equal participation of women and men, which is most conducive to achieving sustainable food security for all;

2. To implement policies aimed at eradicating poverty and inequality and improving physical and economic access by all, at all times, to sufficient, nutritionally adequate and safe food and its effective utilization;

3. To pursue participatory and sustainable food, agriculture, fisheries, forestry and rural development policies and practices in high and low potential areas, which are essential to adequate and reliable food supplies at the household, national, regional and global levels, and combat pests, drought and desertification, considering the multifunctional character of agriculture;

4. To strive to ensure that food, agricultural trade and overall trade policies are conducive to fostering food security for all through a fair and market oriented world trade system;

5. To endeavour to prevent and be prepared for natural disasters and man-made emergencies and to meet transitory and emergency food requirements in ways that encourage recovery, rehabilitation, development and a capacity to satisfy future needs;

6. To promote optimal allocation and use of public and private investments to foster human resources, sustainable food, agriculture, fisheries and forestry systems, and rural development, in high and low potential areas;

7. To implement, monitor, and follow-up the Plan of Action at all levels in cooperation with the international community.

36. Commitment 7 (implementation, monitoring, and follow-up) is of special importance for the present study. The following objectives in the pursuit of commitment 7 were specified:

7.1 To adopt actions within each country's national framework to enhance food security and enable the implementation of the commitments of the World Food Summit Plan of Action;

7.2 To improve subregional, regional, and international cooperation and to mobilize, and optimize the use of, available resources to support national efforts for the earliest possible achievement of sustainable world food security;

7.3 To monitor actively the implementation of the World Food Summit Plan of Action;

7.4 To clarify the content of the right to adequate food and the fundamental right of everyone to be free from hunger, as stated in the International Covenant on Economic, Social and Cultural Rights and other relevant international and regional instruments, and to give particular attention to implementation and full and progressive realization of this right as a means of achieving food security for all;

7.5 To share responsibilities in achieving food security for all so that implementation of the World Food Summit Plan of Action takes place at the lowest possible level at which its purpose could be best achieved.

37. The right to food is thus directly addressed in objective 7.4. The Plan of Action called for the following steps to be taken by Governments, in partnership with all actors of civil society:

(a) Make every effort to implement the provisions of article 11 of the International Covenant on Economic, Social and Cultural Rights and relevant provisions of other international and regional instruments;

(b) Urge States that are not yet parties to the Covenant to adhere to the Covenant at the earliest possible time;

(c) Invite the Committee on Economic, Social and Cultural Rights to give particular attention to this Plan of Action in the framework of its activities and to continue to monitor the implementation of the specific measures provided for in article 11 of the Covenant;

(d) Invite relevant treaty bodies and appropriate specialized agencies of the United Nations to consider how they might contribute, within the framework of the coordinated follow-up by the United Nations system to the major international United Nations conferences and summits, including the World Conference on Human Rights, within the scope of their mandates, to the further implementation of this right;

(e) Invite the United Nations High Commissioner for Human Rights, in consultation with relevant treaty bodies, and in collaboration with relevant specialized agencies and programmes of the United Nations system and appropriate intergovernmental mechanisms, to better define the rights related to food in article 11 of the Covenant and to propose ways to implement and realize these rights as a means of achieving the commitments and objectives of the World Food Summit, taking into account the possibility of formulating voluntary guidelines for food security for all.

The follow-up

38. The High Commissioner for Human Rights has taken several steps to initiate cooperation with the relevant agencies and treaty bodies. A memorandum of understanding with FAO was adopted for the implementation of objective 7.4. The Committee on Economic, Social and Cultural Rights held a Day of General Discussion on the right to food, attended by the High Commissioner and invited experts, on 1 December 1997, followed by the first expert consultation on the matter on 2 December. The main conclusions of that consultation are included in my 1998 progress report (paras. 16-17). They included a recommendation to the Committee on Economic, Social and Cultural Rights to prepare and adopt a general comment on the right to food, and steps were set in motion for this. In November 1998 a second consultation was organized by the Office of the High Commissioner for Human Rights and co-hosted by FAO in Rome. The conclusions of this consultation were reported by the High Commissioner to the Commission on Human Rights in April 1999.

39. The recommendation of the World Food Summit to consider the preparation of "voluntary guidelines" was carried forward in 1997 by three non-governmental organizations or institutions: FIAN, Foodfirst Information and Action Network, the World Alliance on Nutrition and Human Rights and the Jacques Maritain Institute. They started early in 1997 to draft a code of conduct on the human right to adequate food which went through a thorough process of NGO hearings and amendments until a final draft was issued in September 1997. The draft code has already been endorsed by more than 800 NGOs. It is intended to be brought before the relevant international bodies for their consideration at an appropriate time. The draft code of conduct is a well-crafted document responding to the two components of the call by World Food Summit: to clarify the content of the right to adequate food and the fundamental right of everyone to be free from hunger, and to give particular attention to implementation and full and progressive realization of this right as a means of achieving food security for all. Further details about the content of the code is found in chapter VIII of this report.

40. The body that initiated the preparations of the World Food Summit negotiations and whose major task it now is to coordinate the follow-up of the Summit's Plan of Action, the FAO Committee on Food Security, has so far kept a lower profile vis-à-vis objective 7.4 follow-up than might have been expected, possibly waiting for a comprehensive response to the mandate given to the High Commissioner about content clarification and a strategy for implementation of a human rights approach to food security.

41. As to the technical food and nutrition agencies and their staff, the internalization of the value of a human rights approach to food and nutrition

assessment, advocacy and programming has slowly but steadily matured. Within the ACC/SCN, the working group on Nutrition Ethics, and Human Rights has for some years been examining the meaning of a human rights approach to food and nutrition within the scope of development assistance. At its recommendation the ACC/SCN devoted its annual session symposium in 1999 to "The Substance and Politics of a Human Rights Approach to Food and Nutrition Policies and Programmes", which was held in Geneva on 12 and 13 April 1999 and hosted by the High Commissioner for Human Rights. The symposium was attended by senior officials of several agencies together with their technical focal points, proof of an increasing receptivity to human rights among the development agencies. And while a few agencies have for some time been in the front line in advancing a human rights approach (notably UNICEF, more lately FAO), the symposium contributed to consolidating a necessary change in the attitudes of others and a better understanding of the work of the human rights institutions as well as their own place in future collaboration with them. Chapter VIII of this report summarizes the positions taken and the commitments made by representatives of many of the agencies attending this important symposium.

42. The most significant milestone to date in the follow-up process is the preparation and adoption, by the Committee on Economic, Social and Cultural Rights at its twentieth session, of General Comment No. 12 (E/C.12/1999/5) on the right to adequate food (art. 11) on 12 May 1999. That general comment is of central importance and is therefore annexed to this report. Its contents are considered in chapter IV.

43. The net result of these activities since the World Food Summit is that the content of the right to food and nutrition has been made more clear, the awareness of its significance has become more widespread, and more resolute steps are now being taken to implement this right.

IV. CLARIFYING THE RIGHT TO FOOD AND NUTRITION AND THE CORRESPONDING STATE OBLIGATIONS

44. The right to food forms part of the broader right to an adequate standard of living. 10/ The right to an adequate standard of living - or to livelihood - sums up the main concern underlying all economic and social rights, which is to integrate everyone into a humane society. The ultimate purpose of promoting the right to adequate food is to achieve nutritional well-being for the individual child, woman and man. Human nutritional status is determined by at least three major clusters of conditions which interact in a dynamic fashion, relating to food, health and care, and with education as a cross-cutting dimension. Food alone is not sufficient to ensure good nutrition for the individual. The right to adequate food is a necessary, but not alone sufficient component of the right to adequate nutrition. The full realization of the latter depends also on parallel achievements in the fields of health, care for the vulnerable, and education. Later instruments, especially the Convention on the Rights of the Child, recognize this broader right to nutrition as well as its cross-cutting nature relative to many other rights, including civil and political rights.

45. Article 11 of the ICESCR focuses on the food dimensions of the broader concept. The call by the World Food Summit for a better definition of the right to food as contained in article 11 has now in broad outline been met

through the process described in chapter III and culminated with the adoption by the Committee on Economic, Social and Cultural Rights of General Comment No. 12. This is a most significant step in the process towards clarification of the content of the right to food and the steps that should be taken for its realization. Given its origin as the official interpretation by the treaty body responsible for monitoring States parties' implementation of the right to adequate food, this general comment will in the time ahead stand as the most authoritative document formulated to date regarding the right to food.

46. The full text of the general comment on the right to adequate food should be studied as an integral part of this update. The author fully endorses the content of the general comment. Below follow some observations regarding the structure and the main highlights of its contents: the dignity, adequacy and sustainability of availability and access to food.

47. The foundation principle of the human rights system is that everyone is "born free and equal in dignity and rights and should act towards each other in a spirit of fraternity" (UDHR, art. 1). The Committee affirms in its general comment (para. 4) that "the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all."

48. The general comment expresses the core content of the right to adequate food as follows (para. 8):

> The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;
>
> The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

49. The content of "adequacy" is to some extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, but there are some core elements which are applicable under all circumstances and are spelled out in greater detail by the Committee. "Sustainability" incorporates the notion of long-term availability and accessibility and is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations.

50. In clarifying the content of the term adequate, the general comment (paras. 7-11) lays out in some detail the meaning of the sub-concepts of dietary needs, absence of adverse substances, and cultural or consumer acceptability. The concept of sustainability is explained in terms of availability and accessibility - both physical and economic - for different groups of people (paras. 12-13). This level of detail is very useful as it offers an opportunity for more nuanced reporting by States parties on the realization of the right to adequate food, which only attains full meaning

when "food" also reflects the enjoyment of other rights which will ultimately determine accessibility and constitutes a true carrier of nutritional health.

On State obligations, nationally and internationally

51. In very general terms, the legal obligations of States parties to the ICESCR which are set out in article 2 of the Covenant have been spelled out in earlier general comments and are now spelled out in paragraphs 14-16 of the general comment, to which I refer.

52. My 1987 study was intended as a contribution to the clarification of the nature and levels of State obligations under economic and social rights. Drawing on my earlier work, I introduced an analytical framework under which State obligations can be assessed on three levels: the obligation to respect, the obligation to protect, and the obligation to assist and fulfil human rights. The framework proved very useful, and has since been taken widely into use. In my progress report in 1998 I explained my previously elaborated framework in greater detail, as follows: (para. 9).

(a) Since State obligations must be seen in the light of the assumption that human beings, families or wider groups seek to find their own solutions to their needs, States should, at the primary level, respect the resources owned by the individual, her or his freedom to find a job of preference, to make optimal use of her/his own knowledge and the freedom to take the necessary actions and use the necessary resources - alone or in association with others - to satisfy his or her own needs. The State cannot, however, passively leave it at that. Third parties are likely to interfere negatively with the possibilities that individuals or groups otherwise might have had to solve their own needs;

(b) At a secondary level, therefore, State obligations require active protection against other, more assertive or aggressive subjects - more powerful economic interests, such as protection against fraud, against unethical behaviour in trade and contractual relations, against the marketing and dumping of hazardous or dangerous products. This protective function of the State is widely used and is the most important aspect of State obligations with regard to economic, social and cultural rights, similar to the role of the State as protector of civil and political rights;

(c) At the tertiary level, the State has the obligation to facilitate opportunities by which the rights listed can be enjoyed. It takes many forms, some of which are spelled out in the relevant instruments. For example, with regard to the right to food, the State shall, under the International Covenant (art. 11 (2)), take steps to "improve measures of production, conservation and distribution of food by making full use of technical and scientific knowledge and by developing or reforming agrarian systems";

(d) At the fourth and final level, the State has the obligation to fulfil the rights of those who otherwise cannot enjoy their economic, social and cultural rights. This fourth level obligation increases in importance with increasing rates of urbanization and the decline of group or family responsibilities. Obligations towards the elderly and disabled, which in

traditional agricultural society were taken care of by the family, must increasingly be borne by the State and thus by the national society as a whole.

53. The Committee has now generally endorsed this approach in its general comment 12 (para. 15). It will be noted that the Committee has decided to use the three levels of obligations, as originally suggested by me, but has subdivided the third level into the obligation to facilitate and to provide (fulfil), as I have suggested in my later work.

54. Economic and social rights, like all other human rights, are often violated, but there has been some controversy over what constitute a violation of such rights, including the right to food. 11/ This is dealt with in the general comment (paras. 17-20). Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. Resource constraints do not free the Government from responsibility; it still has to show that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. Any discrimination in access to food, as well as to means and entitlements for its procurement, constitutes a violation of the Covenant. Violations can occur through the direct action of States or other entities insufficiently regulated by States. Non-State actors also have responsibilities, and the State should provide an environment that facilitates implementation of these responsibilities. In regard to the private business sector, whether national or transnational, a code of conduct should be agreed upon and made use of.

55. While article 11 of the ICESCR is the key provision in regard to the right to food, it should be kept in mind that issues relating to food and nutrition are dealt with in numerous other international instruments. Of particular importance are article 24 of the Convention on the Rights of the Child and articles 12 and 14 of the Convention on the Elimination of All Forms of Discrimination against Women, both of which deal with the right to adequate nutrition.

56. Important provisions are also found in international humanitarian law as laid down principally in the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. It prohibits the starvation of civilian populations, as well as the destruction of objects indispensable to their survival, such as foodstuffs, agricultural areas, crops, livestock, drinking water installations and irrigation works. It also prohibits methods or means of warfare likely to cause widespread, long-term damage to the environment, thereby jeopardizing the health or survival of the population. It contains provisions concerning humanitarian assistance and relief operations, including the free passage of such essentials as food, medicines and other goods of primary necessity.

57. Much of international humanitarian law was designed for an environment of armed conflict which has undergone significant changes in recent years, notably since the end of the cold war. There has been a shift from conflicts between States - the traditional focus of humanitarian law - to armed conflicts within States, and a rise in intra-State tensions and disturbances short of outright armed conflict. Human rights, including freedom from

hunger, continue generally to apply also during armed conflict. The allocation of responsibility between the different actors involved in the conflict, as well as the rights, obligations and roles of international agencies, are matters of controversy in great need of clarification.

V. ENSURING FREEDOM FROM HUNGER AND IMPLEMENTING THE RIGHT TO ADEQUATE FOOD AT THE NATIONAL LEVEL

58. Conditions differ widely between countries and the most appropriate ways and means to ensure freedom from hunger and to implement the right to adequate food therefore also varies considerably. Each State party to the ICESCR and the Convention on the Rights of the Child must nevertheless take the measures required under the particular conditions prevailing in its country to ensure that everyone is free from hunger, and thereupon move as quickly as possible to a situation where everyone can enjoy their right to adequate food. In so doing, the different levels of State obligations outlined in the general comment and discussed above in chapter IV should be applied, using the particular combination of measures warranted by the national situation.

59. Every country should therefore develop a national strategy to implement the right to food, or if such a national strategy is already in place, it should be revised in light of the observations made in general comment 12. The first step in any such strategy should be to map the situation for the different groups and the different regions within the country, taking into account the differences that might exist on the basis of gender, ethnicity or race, and between rural and urban areas. Such mapping is necessary to identify those who are food insecure and to develop appropriate responses to food insecurity. 12/

60. Food security is currently defined as access by all people at all times to the food needed for a healthy and active life. 13/ Achieving food security means ensuring that sufficient food is available, that supplies are relatively stable and that those in need of food can obtain it. 14/ National food security would therefore mean that everyone has effective entitlements to adequate food or resources for food and that there is in principle enough food to go around. Achieving food security at household level means ensuring that sufficient food is available throughout the territory, that supplies are relatively stable and that everyone within that territory in need of food has the capacity to obtain it for a healthy and productive life. Food insecurity is understood as the reverse: where some people at some or all times do not have access to adequate food and therefore cannot lead a healthy and active life.

61. Food security can therefore be seen as the corollary of the right to food: the State must take the necessary measures to ensure food security for everyone under its jurisdiction. In their national efforts to identify the groups which are food insecure, States should review, periodically and/or when special circumstances cause significant changes, including serious economic depressions - who is likely to be affected and how different groups may be affected differently on the basis of chronic or transitory vulnerability.

62. Having identified the groups which are food insecure, the national strategy should recreate food security for those groups and the population as a whole, formulate policies required for this purpose and identify the resources available, including human resources which, through self-help, can contribute to meet the goals set. When new and severe resource constraints emerge, caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure as a minimum that vulnerable population groups and individuals do not face hunger. This should be achieved through social programmes, safety nets and international assistance.

63. The right to food can only be fully achieved if it is linked to the realization of all other human rights. In the elaboration and implementation of the national strategy for the right to food, people's informed participation is essential. Appropriate decentralization is required to ensure that the particular conditions in the different regions of the country are taken into account, but the central Government remains at all times ultimately responsible for ensuring the enjoyment of this and other human rights.

64. Care must be taken to ensure sustainable management of natural and other resources required for access to food, including the management of land, water and fishery resources. Furthermore, attention must be given to all aspects of the food chain, from production to consumption. Attention must further be given to the processing of food in order to ensure food safety, to the physical distribution of food in order to enable access for all, and to improving markets, inter alia in order to prevent misleading and potentially harmful influences. At the level of the consumer, adequate information is required on the composition of healthy diets. Sanitary conditions and clean water are essential in ensuring that the food actually consumed is safe.

65. The strategy should give particular attention to the need to prevent discrimination in access to food or resources for food. It should keep in mind the need to give particular attention to vulnerable groups and to the gender situation. Indigenous peoples and some minorities often suffer from more serious malnutrition than the average population, and we have seen that women in many societies face far greater difficulties than men. The strategy should therefore include, inter alia: guarantees of full and equal access, particularly for women, to economic resources, including the right to inheritance and ownership of land and other property, credit, natural resources and appropriate technology; measures to respect and protect self-employment and work which provides a remuneration ensuring a decent living for wage earners and their families (as stipulated in article 7 (a) (ii) of the Covenant); maintaining registries on land rights (including forests) and fishing resources important for food production or other means of livelihood in rural areas; special legislation to protect the land rights of indigenous peoples and prevent forced evictions from their land; measures to protect or secure entitlements to land or other sources of livelihood among vulnerable smallholders, landless peasants and urban poor without discrimination as to race or ethnicity.

Strategy elaboration: Brazil and South Africa

66. Several positive examples exist of States where efforts are now being made to elaborate a human rights-based strategy to ensure freedom from hunger and the enjoyment of the right to food. Brief mention will be made here of two countries which, each in its own way, have gone through great political difficulties and where severe social inequalities exist, but where steps are now under elaboration to address in a direct way the human rights aspects of food and nutrition.

67. Brazil traditionally has been socially divided due to severe differences in income, which partly explains past occurrences of military rule. Democratic efforts towards social integration and greater equality have given rise to efforts to develop a strategy for the elimination of hunger and the right to food. The National Food Security Council, established in 1993, was replaced in 1995 by the broader State-civil society link mechanism Communidade Solidária, which operates within the Presidency. The National Human Rights Programme, which was enacted in 1996, focused initially solely on civil and political rights. The food security movement, in its preparations for the World Food Summit, recognized that a human rights framework was required. This resulted in a partial merging of the human rights movement and the networks devoted to food security and nutrition.

68. A strategy-building cooperative network now involves, inter alia, the Ministry of Health, the Ministry of Planning, UNICEF, and the non-governmental network Agora. In 1998 the Ministry of Health initiated a process of developing health policies. Following discussions with representatives of the civil society it was agreed to make use of the human rights approach to health. The first sector chosen for policy development and implementation was the national food and nutrition policy. A step-by-step process has been initiated. The first area of concern was iron deficiency anaemia, which is said to be the most prevalent nutrition problem in Brazil. A task of a different order has been to train nutrition managers at different levels to take into account the human rights approach to their work. 15/

69. In South Africa, apartheid was a policy deliberately intended to create and maintain differences. Its legacies are not easily overcome in post-apartheid South Africa. Social indicators show an extreme difference in income and consumption between the rich (most of whom are White) and the poor (most of whom are Africans). The South African Constitution, adopted in 1996, is intended to transform the society so that everyone can enjoy their freedom and dignity. The Constitution ranks as one of the best in the world with its inclusion of all human rights, the economic, social and cultural as well as the civil and political. In the Bill of Rights, section 7 (2), the State is required to respect, protect, promote and fulfil the realization of all human rights, including social and economic rights.

70. The South African Human Rights Commission has, under section 184 (1) of the Constitution, been given the task, inter alia, to monitor and assess the observance of human rights in South Africa. This gives the Commission powers to investigate and report on the observance of human rights; take steps to secure appropriate redress where human rights have been violated; conduct research on the realization of human rights and provide human rights

education. From 25 to 27 March 1999 the Commission, in cooperation with UNICEF and the World Alliance for Nutrition and Human Rights, held a conference in Johannesburg on the right to food and nutrition (to which this author was invited as a speaker). It can be seen as a first step towards the development of a national strategy to ensure freedom from hunger and the right to food. Extensive participation by representatives of government departments and representatives of the civil society gave rise to a set of constructive proposals to further develop a human rights oriented national food and nutrition strategy. 16/

VI. MONITORING AND DIALOGUE IN THE RELEVANT TREATY BODIES

71. International monitoring of human rights is essential for effective and comprehensive implementation. The process of monitoring provides opportunities for dialogue and learning. Since three of the main international human rights instruments deal with the rights to food and nutrition, three treaty bodies are involved in that dialogue. This chapter provides some examples of food and nutrition issues which have been dealt with in these bodies. The cases are brought up solely as illustrations; others could have been chosen but are not included here for lack of space.

Committee on Economic, Social and Cultural Rights

72. The Committee on Economic, Social and Cultural Rights is the main treaty body addressing the right to food. With the adoption in May 1999 of its general comment 12 on the right to food it now has a solid basis for its monitoring of national implementation of that right, particularly if States parties follow the recommendation to adopt a strategy, including framework legislation and the establishment of verifiable benchmarks for subsequent national and international monitoring. 17/

73. Few States parties have in their reports provided information sufficient and precise enough to enable the Committee to determine the prevailing situation in the countries concerned and identify the obstacles to the realization of the rights under discussion. Provided States parties cooperate in the future along the lines suggested in general comment 12, it will become much easier to monitor future developments regarding the right to food.

74. Country situations where the Committee has expressed serious concerns over violations of the right to food include Nigeria and Guatemala. In the concluding observations in the case of Nigeria (E/C.12/1/Add.23 of 13 May 1998), the Committee stated that it was greatly disturbed that 21 per cent of the population of Nigeria was living below the poverty line in spite of the country's rich natural resources. The Committee further noted with concern that due to poor economic and administrative mismanagement, corruption, runaway inflation and the rapid devaluation of the naira, Nigeria ranked among the world's 20 poorest countries. The Committee pointed out that according to World Bank estimates at least 17 million Nigerians, many of them children, were undernourished.

75. In its concluding observations regarding Guatemala (E/C.12/1/Add.3 of 28 May 1996) the Committee expressed serious concern at the adverse effects of the economic and social disparities on the enjoyment of economic, social

and cultural rights by the majority of the population, particularly by the indigenous and rural populations of Guatemala. The Committee noted that "far reaching racial discrimination, extreme poverty and social exclusion in relation to the indigenous populations negatively affected their enjoyment of economic, social and cultural rights, and were matters of deep concern for the Committee. While the Committee appreciated the open admission of the Government that land had been illegally appropriated by force in the past and that plans were in place to address this problem, the Committee remained convinced that the issue of land ownership and distribution was crucial to addressing the economic, social and cultural grievances of a substantial segment of the population.

76. In the cases both of Nigeria and Guatemala, the reports addressed the situation under Governments which have since been replaced. Hopefully, the new Governments will take serious and meaningful steps to redress the situation. They should as soon as possible adopt the strategy plans recommended by the Committee and work closely with the relevant international agencies to ensure the elimination of hunger caused by past mismanagement, and ensure the enjoyment for all of adequate food.

77. The relationship between sanctions and the right to food has received considerable attention, particularly in the case of Iraq, and was addressed by the Committee on Economic, Social and Cultural Rights in its general comment 8, (E/C.12/1997/8) adopted at its seventeenth session. The Committee made an important point by emphasizing that in considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing élite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country. The obligations under the Covenant remain applicable even when it has been decided for purposes of international peace and security to impose sanctions.

78. Obligations exist both for the target State and for those participating in the imposition and application of sanctions. The State which is the target of sanctions remains obliged under the Covenant to take steps "to the maximum of its available resources" to provide the greatest possible protection for the economic, social and cultural rights of each individual living within its jurisdiction and to ensure that there is no discrimination in relation to the enjoyment of these rights. The target State must take all possible measures, including negotiations with other States and the international community, to reduce to a minimum the negative impact upon the rights of vulnerable groups within the society.

79. But, as pointed out by the Committee, obligations apply also to actors responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organization, or a State or group of States. Economic and social rights must be taken fully into account when designing an appropriate sanctions regime. Effective monitoring should also be undertaken as long as the sanctions are in force, to protect the economic, social and cultural rights of the affected population. Those who are imposing the sanction must "take steps, individually and through international assistance and

cooperation, especially economic and technical" in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.

Committee on the Rights of the Child

80. The monitoring carried out by the Committee on the Rights of the Child (CRC) is also relevant here. States have under article 27 recognized the right of every child to an adequate standard of living, and under article 24, States have committed themselves to combat malnutrition through, inter alia, the provision of adequate nutritious foods and clean drinking water. The Committee in its examination of States parties' reports frequently addresses the situation of food and nutrition for children. It is also concerned with the pre-natal and post-natal health of mothers, and underlines the significance of breastfeeding as a major requirement in avoiding malnutrition and disease in children. Two examples show the direction of its concerns.

81. In the concluding observations of the Committee on the Rights of the Child relating to the report by Belize (CRC/C/15/Add.99 of 10 May 1999), the Committee noted with concern the health situation of children in the State party and expressed its concern at the high child and infant mortality rates, poor breastfeeding practices, the high rate of malnutrition, the increasing incidence of stunting and the limited access to safe drinking water, especially in rural communities. The Committee encouraged the State party to develop comprehensive policies and programmes to reduce the incidence of child and infant mortality, to promote and improve breastfeeding practices, to prevent and combat malnutrition, especially in vulnerable and disadvantaged groups of children, and to consider requesting technical assistance for the Integrated Management of Childhood Illnesses and other measures for child health improvement from, inter alia, UNICEF and WHO.

82. Thailand is a country in which considerable progress has been recorded, but problems still remain. In the concluding observations relating to the report of Thailand (CRC/C/15/Add.97 of 29 October 1998), the Committee noted the efforts of the State party to reduce the child and infant mortality rates, but expressed its concern at the persistence of poor breastfeeding practices and the high rate of malnutrition. The Committee encouraged the State party to develop comprehensive policies and programmes to promote and improve breastfeeding practices, to prevent and combat malnutrition, especially among vulnerable and disadvantaged groups of children, and consider seeking technical assistance for the Integrated Management of Childhood Illnesses and other measures for child health improvement from, inter alia, UNICEF and WHO.

Committee on the Elimination of Discrimination against Women

83. The Committee on the Elimination of Discrimination against Women (CEDAW) also has important tasks to perform in regard to the rights to food and nutrition. It has been shown that cultural traditions in some parts of the world cause women, particularly the girl child and women of reproductive age, to have less access to adequate food than the boys and men. This has serious consequences both for the women themselves and for the children born to them,

since inadequate nutrition in the pre-natal and post natal periods will cause malnutrition in the child, whether boy or girl, the consequences of which can last an entire lifetime.

84. The Committee should therefore monitor the implementation of article 5 of the Convention by which States have undertaken to modify social and cultural patterns of conduct to eliminate practices based, inter alia, on stereotyped roles for men and women. Traditionally based sex roles lead in some countries to serious inequalities in the access to adequate food with far-reaching consequences for malnutrition, as pointed out in chapter II of this report. Systematic information and education at school and through other channels should demonstrate the risk and dangers of practices and roles which cause malnutrition in women of reproductive age and particularly during and after pregnancy. Article 12, paragraph 2 requires that adequate nutrition during pregnancy and lactation be ensured. The Committee should, in reviewing States parties' reports, require information specifically on the implementation of these provisions and draw on the material collected by FIVIMS. On that basis it should call on States to report on measures taken to ensure gender equality in access to food and that the special needs of women during pregnancy and lactation are safeguarded.

VII. THE ROLE OF THE COMMISSION ON HUMAN RIGHTS AND ITS SPECIAL RAPPORTEURS

85. The Commission on Human Rights in its most recent resolution on the right to food, resolution 1999/24, reaffirmed that hunger constitutes an outrage and a violation of human dignity, and called for the adoption of urgent measures at the national, regional and international level. It has not, however, systematically addressed the right to food or other aspects of the right of everyone to an adequate standard of living, except in the context of the right to development (see further chapter IX below). Nor so far has a thematic rapporteur been appointed to address this issue. Economic and social rights had generally received limited systematic attention by the Commission until in 1998 it appointed a special rapporteur on the right to education, which was a very welcome step. Hopefully, this is the beginning of more consistent attention to the implementation of economic and social rights.

86. More encouragingly, some of the special rapporteurs on country situations have in recent years started to give attention not only to civil and political rights but also to economic and social rights. For purposes of illustration, four of the reports presented at the fifty-fifth session of the Commission in 1999 are briefly examined here: those on Afghanistan, Iraq, Myanmar and Nigeria.

87. In his report on the situation of human rights in Afghanistan (E/CN.4/1999/40), the Special Rapporteur, Mr. Kamal Hossain, pointed to the widespread loss of human life, destruction of social and economic infrastructure, environmental degradation, food insecurity and malnutrition. Food consumption per capita was still lower than before the war. Chronic malnutrition existed in most parts of Afghanistan, and the infant and maternal mortality rates were among the highest in the world. In most of the country, women suffered deprivation due to widespread poverty, low literacy levels, limited opportunities to participate in public life, limited availability of

health care facilities and restrictions on the employment of women in urban areas. The country had acquired the dubious distinction of being the world's largest producer of narcotic substances.

88. In his report on the situation of human rights in Myanmar (E/CN.4/1999/35), the Special Rapporteur, Mr. Rajsoomer Lallah, noted that prisoners were said to be denied adequate food (in amount and quality) and health care. Violence against civilians was a fundamental component of the overall military strategy of the Myanmar army and designed not only to secure resources from the local population, in particular food, combatants and workers, and to weaken the resource base of insurgent groups and their capacity to govern by systematically destroying most of the villages, but also, as the local economy is largely based on agriculture, forcibly to displace the rural population so as to disrupt agricultural production. Testimonies indicated that the armed forces often resorted to searches, destruction and burning of houses and confiscation of property and food to force the people to move, temporarily or permanently. Because of the massive displacement of the population, farming had apparently been drastically reduced. This has led to food shortages among the rural population generally and has provoked voluntary displacement to other areas in search of assistance and security. Apart from the lack of security, the lack of food was clearly the main problem facing families living in the jungle. Families supplemented their rice porridge by eating wild roots, leaves and fruit. Many families interviewed said that they could not cultivate their crop safely and that when they were discovered their fields and paddies were burned. As a result, without any source of income and without enough food to survive, they tried to find their way to Thailand.

89. In his report on the situation of human rights in Nigeria (E/CN.4/1999/36), the Special Rapporteur, Mr. Soli Jehangir Sorabjee, dealt at some length with economic, social and cultural rights. His 1999 report came after the change in Government from a period of authoritarian military rule with drastically negative consequences. Mr. Sorabjee noted that the new Government was faced with a daunting challenge, in response to which it had put in place a policy which reflected greater concern for fundamental economic, social and cultural rights. At present the majority of the population did not have access to health facilities, education, food, shelter, or basic amenities such as safe water. The majority of Nigerians were living well below decent social thresholds. The underfunding of the health sector, a situation which had continued for over a decade, meant a steady deterioration in health services. The infant mortality rate in Nigeria had reached 84 per 1,000 and the maternal mortality rate was 800 per 100,000.

90. The situation in Iraq has given grounds for particular concern since the country for many years has been the subject of economic sanctions, which have contributed to serious malnutrition in the country. It is a matter of some controversy, however, where the responsibility for this state of affairs lies. In his report to the Commission at its fifty-fourth session in 1998 on the situation of human rights in Iraq (E/CN.4/1998/67), the Special Rapporteur, Mr. Max van der Stoel, referred to the general comment made by the Committee on Economic and Social Rights in December 1997 on sanctions. He pointed out that the Government of Iraq remained responsible for implementation of its obligations relating to the rights to food and health care to the maximum of

its available resources. He further argued that if the Government of Iraq had not waited five years to decide to accept the "oil-for-food" agreement proposed as early as 1991 in Security Council resolutions 706 (1991) and 712 (1991) to meet the humanitarian needs of the population, millions of innocent people would have avoided serious and prolonged suffering. He also referred to reports stating that the effect of the embargo was harsher on members of ethnic and religious minorities, and that there existed discrimination in the allocation by the authorities of the limited resources available between rural and urban areas, and against the southern region with respect to the Marsh people. He therefore concluded that while he was aware of the slowness of United Nations procedures for processing purchase contracts, the Government of Iraq also had the responsibility to assist the approval process.

91. In the view of the present author, the conclusion to be drawn from the example of Iraq is that both the Government and the international community have the responsibility to ensure that sanctions do not cause serious violations of human rights, in particular the rights to food and to be free from hunger, and that the responsibility of the international community remains even when the target Government does not cooperate or when it discriminates between groups in their access to food; those who have initiated the sanctions remain responsible for taking corrective measures to ensure access to food.

92. While the four country reports mentioned above have given attention to the right to food and nutrition, in many other cases this is not done even where it could have been expected. The Commission should explicitly include in the mandates for the special rapporteurs, wherever appropriate, the task to examine also the situation with regard to this right.

VIII. THE EVOLVING ROLE OF UNITED NATIONS BODIES, SPECIALIZED AGENCIES AND NON-GOVERNMENTAL ORGANIZATIONS

93. One of the main purposes of the United Nations as listed in Article 55 of the Charter is to promote higher standards of living. Priority should be given to ensure that those presently vulnerable reach an adequate standard of living or at least that they are free from hunger. Another major purpose of the United Nations is to promote universal respect for and observance of human rights. These two tasks are closely intertwined; indeed, social development is increasingly seen and understood as the realization of all human rights for all. The reasoning underlying the human rights approach in this field can be exemplified by a statement by Søren Jessen-Petersen, Assistant United Nations High Commissioner for Refugees. In the area of refugee protection and assistance, as in other fields, the added value of the human rights approach is that it ensures that humanitarian action is based on the rights of the beneficiaries and is not simply a gratuitous act of charity. The refugee ceases to be a mere "recipient" and becomes a "claimant", with a voice and the power to participate in endeavours to meet their basic needs. The human rights approach underlines the legal obligations of States to meet the basic needs of the most vulnerable individuals (including refugees). It leads to a recognition that the role of humanitarian agencies such as UNHCR is to provide support to States in fulfilling their responsibilities, rather than being a substitute for State action (or inaction). 18/ A similar philosophy underlies

the Declaration on the Right to Development: the individual is the central subject of development and should be the active participant and beneficiary of the right to development (art. 2).

94. In recent years, an increasing number of United Nations agencies and other bodies have recognized the necessity of using a human rights framework in their work. This has gone hand in hand with an increasing attention to economic and social rights as being of equal value to civil and political rights. The present chapter looks at the evolving conception by United Nations bodies and specialized agencies of their role in promoting the human right to food and nutrition.

95. FAO is the lead agency in matters relating to food. It was the host of the World Food Conference in 1974, co-organizer with WHO of the International Conference on Nutrition in 1992, and organizer of the World Food Summit in 1996, playing a major role in the follow-up of the commitments made during the last. The preamble to the FAO Constitution sets "ensuring humanity's freedom from hunger" as one of the basic purposes of the organization. The rights related to food are therefore of special concern to FAO. 19/ During the celebration of the fiftieth anniversary of the Universal Declaration of Human Rights in 1998, FAO produced an excellent booklet on the right to food, entitled "The Right to Food in Theory and Practice", which provided information about the activities of FAO itself and other food-related organizations. Among the many other functions FAO can serve in the future is to make use of its considerable expertise and accumulated knowledge concerning legislation in the field of food and agriculture. The organization is in an excellent position to assist States in the drafting of the national framework legislation requested by the Committee on Economic, Social and Cultural Rights in its general comment 12 (para. 29).

96. One of the important bodies under FAO is the Committee on Food Security (CFS), whose concerns include the elimination of food insecurity wherever it may occur. The CFS played a major role in the preparation of the Rome Declaration and World Summit Plan of Action and monitors the implementation by States of their commitments made at the Summit. The CFS at its twenty-fifth session in 1999 commended the collaboration between FAO and the Committee on Economic, Social and Cultural Rights and welcomed the proposal that the cooperation between these institutions be strengthened on a continuing basis.

97. One of the most pressing tasks is to identify the hungry and the particular causes of their hunger. The Food Insecurity and Vulnerability Information and Mapping System (FIVIMS) now being developed by FAO in collaboration with other agencies is intended to find out exactly that, in close collaboration with national FIVIMS. Precise identification, using the human rights framework, of the food insecure or vulnerable groups - who they are, where they are located and the particular causes underlying their vulnerability - will vastly improve the possibility of developing precise and appropriate responses to those particular situations.

98. The International Fund for Agricultural Development (IFAD) assists developing countries in combating rural poverty and improving food production and nutritional levels through investment in poverty alleviation. Part of its activity has been to strengthen the position of rural women, who traditionally

often have faced discrimination in the economic field. Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women requires States to ensure that rural women have the right to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform and resettlement schemes. IFAD projects have sought to support women's productive activities by providing small credit together with training and access to improved and appropriate technology. A stronger reliance on the provisions of the Convention and other human rights instruments would further strengthen the role of IFAD in these endeavours.

99. The World Food Programme (WFP) is the food aid agency of the United Nations with a devotion to the protection of freedom from hunger. A human rights approach is important for its work. The WFP increasingly faces conflict situations where hunger has become a weapon of war and where civilians increasingly are subjected to starvation as part of armed conflict. War-affected populations are denied access to food along with other types of humanitarian assistance; WFP seeks to help but often under very difficult circumstances. The prevention of access to humanitarian food aid in internal or international conflicts is a violation of the right to food.

100. Armed conflict is not, however, the main cause of hunger. Hundreds of millions of people suffer from the "silent emergency" of chronic hunger, which is a violation or neglect of human rights in itself, and which also causes difficulties for the enjoyment of other human rights. Those affected cannot participate in the development process. Hunger keeps them weak, beset by disease and often lethargic, and when families use most of their time or income to obtain food, they have little possibility for educational or economic activities which could lift them out of their poverty. For these people to have a chance to become active and creative partners in development, timely food aid can be of great help. The WFP approach is to use food aid as a pre-investment to enable marginalized people to take up development opportunities. The food aid gives them temporary food security so that they can get started in the process of helping themselves. It is short-term help that can lead to long-term progress. 20/

101. Refugees and displaced persons who have been violently uprooted by conflict, persecution and human rights abuses are particularly at risk of being denied access to adequate food. UNHCR and WFP have signed a memorandum of understanding which covers cooperation in the provision of food aid to refugees, returnees and, in specific situations, internally displaced persons.

102. UNICEF has taken an explicit political decision to make the realization of the rights contained in the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women the heart of its mandate. The determinants of good nutrition for children - food, care and health - are covered in the former, particularly article 24. The latter contains similar provisions with respect to the health and nutrition of women. UNICEF uses these two human rights instruments in its struggle against hunger and malnutrition by emphasizing the responsibility of Governments and other actors arising from these conventions, and by a reorientation of the understanding of the nutrition problem. A rights-based approach does treat malnutrition as a purely technical problem, but as a set of violations or as neglect.

103. UNICEF holds that rights-based programming and policy development carries a commitment to real participation of those affected. Stephen Lewis, the Deputy Executive Director of UNICEF, argues that when malnutrition is understood as a violation of human rights, it has profound implications for the way the United Nations and government partners do business. It should change the approach to adults (mostly women) and children who are sufferers or potential sufferers of malnutrition. It should improve the effectiveness and sustainability of actions undertaken. Respect, protection, facilitation and fulfilment of nutrition rights are also linked to the evolving concept of good governance at the global, national and local levels. 21/

104. WHO is now taking a stronger interest in a human rights approach to food and nutrition as an important element in the right to food. The new Director-General, Gro Harlem Brundtland, has expressed strong commitments in this direction. 22/ "A malnourished child is not only more vulnerable to disease. Cognitive development will be in peril, especially during the first three years of life. Stunted physical growth may therefore be closely linked to reduced mental development. With a distorted intake of nutrients - too little, too much, or unsafe - or with too great a loss of nutrients for example through diarrhoea or errors of metabolism - we easily fall prey to ill-health and disease ... The proper mix of nutrients under clean and safe conditions must be available to all." She has further noted that "human rights begin at home", which means that the agencies, including WHO, should create an internal working environment to take a human rights approach. Statements made during the recent visits by the Director-General to the food agencies in Rome indicate that WHO is also prepared to join in an intersectoral and inter-agency approach to basic rights. The right to food and its relationship to nutritional health appears a good place to start.

105. According to James Lovelace of the World Bank, 23/ the Bank recognizes that the human rights approach to nutrition is an important new narrative of the international development discourse. The Bank is only beginning to explore the implications of the human rights framework for its work. Support for governance reform and support for equitable economic growth are but two aspects of the Bank's comprehensive approach which will strengthen the human rights culture. The intention is to remain focused on action to combat malnutrition, working with countries and partner agencies to significantly increase the global resources allocated to nutrition. The Bank will take action to increase the awareness of country officials about nutrition problems. The Bank will incorporate nutrition into agriculture and rural development projects and food policy reform and ensure that nutrition is part of the design of health projects.

106. As pointed out in my 1998 progress report (para. 38), the policy document by UNDP finalized in 1997 and published in January 1998 entitled "Integrating human rights with sustainable human development" has been a major milestone in the ongoing shift towards a human rights approach to development.

107. For the technical and strategic roles that the United Nations system as a whole can play in the future work to advance the right to adequate food in the pursuance of nutrition rights, the Sub-Committee on Nutrition of the Administrative Committee on Coordination (ACC/SCN) needs special attention as the focal point for harmonizing policies and activities in nutrition of the

United Nations system. 24/ Besides compiling and disseminating information, SCN promotes coordinated inter-agency activities aimed at reducing malnutrition. The SCN is responsible for overseeing the direction, scale, coherence and impact of the United Nations response to the nutritional problems of the world. The recent Commission on Nutrition Challenges for the 21st Century, whose report is referred to in chapter II of this report, was an initiative of the SCN.

108. Given its mandate and scope, the SCN is an important forum in which to channel information and initiatives regarding the human rights approach to the alleviation of hunger and poverty, thereby promoting food and nutrition security. The SCN has a working group on Nutrition, Ethics and Human Rights where, through its successive meetings and dialogue since 1994, member agencies and observers have discussed the potential of such an approach. The value of a human rights approach to food and nutrition policies and programmes was recognized in particular through the successful symposium on this topic hosted by the High Commissioner for Human Rights in Geneva in April 1999, described in chapter III above. Provided appropriate professional and institutional working linkages can be established between OHCHR and SCN, a system-wide assault on violations and neglect of food and nutrition rights the world over can be set in motion, involving many agencies separately and collectively. It would encompass technical standard-setting, development of benchmarks and indicators, and food and nutrition policy guidance - now founded on a human rights platform. It could enhance the quality of reporting to and monitoring by the Committee on Economic, Social and Cultural Rights by advancing the knowledge of the critical factors influencing food and nutrition.

109. Another channel for pursuing the right to adequate food should be the ACC Network on Rural Development and Food Security established in April 1997 as the mechanism for inter-agency follow-up to the World Food Summit, jointly managed by FAO and IFAD in close cooperation with WFP. The Network currently includes 20 interested United Nations organizations which participate in and support country-focused and demand-driven thematic groups composed of the concerned partners, including United Nations agencies, national institutions, bilateral donors and civil society organizations, setting agendas and implementing activities that meet national needs and priorities.

110. Research institutions can also have important roles to play in the advancement of the right to food. The International Food Policy Research Institute (IFPRI), headquartered in Washington, requires special mention. IFPRI focuses on research to help foster sustainable economic growth and combat poverty through better government policies. Aiming at reducing hunger and malnutrition, IFPRI's interest extends to social, economic and institutional forces that drive the food sector and bear on the development process. A major recent IFPRI initiative is the 2020 Vision for Food, Agriculture, and the Environment to "identify solutions for meeting future world food needs while reducing poverty and protecting the environment". IFPRI is in a special position to conduct and promote research and policy to promote the right to adequate food from a human rights perspective. A first IFPRI policy brief on the right to food was issued in 1995, and a new brief will be forthcoming in 1999 under the 2020 initiative.

111. The role of the civil society and the non-governmental sector will be crucial in advancing freedom from hunger and the right to adequate food. Non-governmental human rights organizations have for a long time concentrated mainly on civil and political rights, whereas non-governmental development organizations have given little attention to human rights. In recent years, this has changed. An increasing number of NGOs and social movements have started to use the human rights framework and this is likely to increase with the growing precision of the content of economic and social rights. As to the right to food, Michael Windfuhr, representing one of these organizations, has pointed out that "... many NGOs are well aware that promotion of the right to food requires a clear definition of the basic concept of economic, social and cultural rights and a continuous 'unlearning' of the reductionist human rights concept, which is focused entirely on civil and political rights, as well as the reductionist concepts of food security that focus only or mostly on agricultural productivity and harvest yield". 25/

112. NGOs took a great interest in the World Food Summit. More than 1,000 organizations from more than 80 countries attended the parallel NGO Forum during the Summit. One of their demands was the preparation of a code of conduct on the right to adequate food. In objective 7.4 of the Summit Plan of Action, the World Food Summit opened up the possibility of preparing "voluntary guidelines" for promoting the right to food and food security. FoodFirst Information and Action Network (FIAN), the World Alliance for Nutrition and Human Rights and the Jacques Maritain Institute took the initiative and have jointly drafted such a code in consultation with a large number of other NGOs worldwide. It sets out the normative content of the human right to adequate food, the corresponding obligations including State obligations at the national level and at the international level, the responsibilities of international organizations, and regulation of economic enterprises and other actors. It deals with the national framework for monitoring and recourse procedures, and with international reporting and support mechanisms. The draft code also sets out responsibilities of the actors of civil society. The NGOs involved intend to place the proposed code of conduct on the agendas of the Commission on Human Rights and the FAO Committee on Food Security. 26/ Another NGO initiative, the Global Forum for Sustainable Food and Nutritional Security, established as a post-World Food Summit network to ensure continued debate and mutual support especially among NGOs in the South, can be a critical factor in mobilizing more NGOs for the right to food the world over.

113. A whole set of special problems arise for agencies and organizations involved in humanitarian action during armed conflict. These difficult issues are not addressed by the present study. It would be highly desirable that a separate study or report be prepared on the implementation in times of armed conflict of economic and social rights, including the right to food. Suffice it here to say that established humanitarian actors such as the International Committee of the Red Cross and the Federation of Red Cross and Red Crescent Societies have been joined both by several intergovernmental organizations and by a multitude of NGOs. Each of them has their own specific mandates and their particular ethical and moral perspectives. Coordination and accountability have become matters of great difficulty.

IX. GLOBALIZATION AND THE RIGHT TO FOOD

114. The main features of globalization have been an increasing reliance on a deregulated global market, maximally free trade, uncontrolled flow of investment, and the paramount role of the international financial market, with the IMF and the World Bank moving to the centre stage of world power. In a wider perspective, the content of globalization is also affected by developments in science and technology, communications and, in particular, information-processing, which has substantially changed the structure of the global system. Positive aspects of globalization therefore include advances in communication and information and therefore much greater openness.

115. We have, however, seen too much of the downside of globalization. Imposed requirements of structural adjustment and the burden of debt are both part and parcel of the globalization process. The policies of structural adjustment pursued in the 1980s probably contributed in many places to intensified tension between the different ethnic, racial or social groups in society, and may have had enormous cost in terms of lost development opportunities and may have hampered many groups in their enjoyment of the right to food. In recent years, the policies of structural adjustment have been improved but continue to carry risks for the economic and social rights of the most vulnerable part of the population.

116. The Committee on Economic, Social and Cultural Rights on 11 May 1998 adopted a statement on globalization (E/1999/22, paras. 515-516) in which the Committee, reflecting on the downside of globalization, argued that its negative risks can be guarded against, or compensated for, if appropriate policies are put in place, but that insufficient efforts are being made to devise new or complementary approaches which could enhance the compatibility of those trends and policies with full respect for economic, social and cultural rights. As noted by the Committee, Governments and intergovernmental and international organizations have a strong and continuous responsibility to take whatever measures they can to act in ways compatible with their human rights obligations. The areas of trade, finance and investment are not exempted from such responsibilities.

117. Globalization should also mean global responsibility, including global responsibility to assist in the creation of conditions for the full enjoyment of human rights. It is in this context that the right to development has its main significance, with its dual emphasis on domestic implementation of all human rights and international cooperation to make that possible. While on the one hand every Government should remove obstacles blocking development within its State, such as failure to observe civil, political, economic, social and cultural rights, effective international cooperation is essential in providing developing countries with appropriate means and facilities to foster their comprehensive development, in accordance with the Declaration on the Right to Development.

118. Globalization of the market should be regulated through application of environmental standards and universal human rights, through determined action both by the United Nations and by States. While WTO, the IMF and, to some extent, the World Bank are institutional agents of globalization, the United Nations, in particular its human rights bodies but also other agencies

such as the UNDP, are now agents of the universalization of rights. A constructive and corrective relationship between the forces of the market and the powers of the State requires good governance, which means that it shall be so structured that it optimally implements human rights. It requires rule of law, transparency, responsiveness and accountability at the national level, and it also requires rule of law, transparency and, in particular, responsiveness by the international community.

119. It is within this framework that we must consider also the prospects for the right to adequate food: the potential for and constraints to its universalization. Among the critical evolving issues are the effects of liberalized trade and the negotiations over trade barriers including standards set to protect the health of consumers. Another set of issues are those related to the revolution in biotechnology and the opportunities for modifying and transferring plant or animal gene material between organisms - both within and across species frontiers - for more effective food production, whether facilitated by public or private sector research.

120. Derived from these innovations is the particular claim for intellectual property rights (IPRs) in connection with engineered new forms of live material. In the case of new varieties of plants this has come mainly in the form of "plant breeders' rights" 27/ though some countries also allow industrial patents for biological materials. The human rights concern with respect to IPR has found its place in the realm of cultural rights. The merit of IPR from a human rights perspective becomes less obvious when they are used by powerful economic actors as a tool to control the economically weaker producers of food for human consumption (or of other agricultural products that indirectly affect the distribution of the means of production of food). There has been growing concern that intellectual property rights as presently defined may seriously threaten the pattern of and control over our future food supply. It may therefore be time that IPR be studied by the human rights community in order to outline potential conflicts of interests that may seriously jeopardize the right to adequate food.

121. Another set of rights - and interest groups to claim them - outside the international human rights system are farmers' rights, currently being debated in international forums. 28/ The concept of farmers' rights is based on the notion that farmers, both historically and at present, have made great contributions to the conservation and development of agricultural biodiversity. Whereas commercial interests have recourse to rights such as IPRs, farmers typically have no formal rights and no protection associated with their activities. Farmers' rights should be given attention by the human rights community and promoted in the continued promotion of the right to food, since our future food supply and its sustainability may depend on such rights being established on a firm footing.

122. Finally, "consumer rights" is still another set of rights outside the international human rights system and claimed by a particular interest group. Because all human beings are also consumers, it may be useful to explore how international consumers' rights and duties, as established by a large international consumers' organization 29/ and backed up by United Nations-based guidelines for consumer protection, can help in the realization of the right to adequate food as a human right. Consumer groups

may benefit from using human rights norms, particularly those regarding the right to adequate food. Consumer rights can also serve as references in the interpretation of treaty-based provisions relevant to the right to food and nutrition.

123. The process of globalization as it affects food has many and complex features and we may be just at the beginning of understanding its long-term effects. In a situation where there is no agreement, even among technical experts, on whether genetically modified organisms (GMO), now slowly entering the food manufacturing arena, are dangerous to health; whether they should be clearly indicated on the label; whether they are being adequately monitored by quality-control systems; and whether proof should be given that food containing GMO is safe before it is marketed. The notion of the global supermarket born in the late 1970s takes on truly new dimensions. At the time it described the growing uniformity of dietary patterns and the threats to small farmers and food-processing enterprises, and a trend towards monocultures and large processing conglomerates. As if this were not problematic enough, the added safety dimensions and the potential implications for health of the globalizing supermarket warrant closer attention to be paid to the means used to realize the universal right to adequate food.

124. In discussing possible future trade-off between health (and other so-called non-trade) values as "trade barriers" and guaranteeing access to safe food as an integral part of the right to adequate food, paragraph 36 of general comment 12 on the right to adequate food should be borne in mind. This was discussed in chapter IV but is worthy of completing this chapter: "States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end." In the forthcoming new round of trade negotiations within WTO, concerned States and NGOs may do well to keep this statement in mind.

125. I have pointed to some of the issues which need to be addressed in future work on the right to adequate food. The answers are not clear at this stage, however, in line with the statement on globalization in 1998 by the Committee, it is incumbent on the international community to guard against the negative risks. This must be done concurrently with pursuing approaches which can improve the access to food for those who are most vulnerable.

X. CONCLUSIONS AND RECOMMENDATIONS

Conclusions

126. Three major points emerge from this update of the study on the right to adequate food:

- Firstly, that since 1987 there has been a much better and more widely shared understanding of the impact of hunger and malnutrition, and a more general awareness that their consequences are far worse than was previously recognized;

Secondly, that there is a much broader recognition of the right to be free from hunger and to adequate food as human rights. The adoption by the World Food Summit in 1996 of its Plan of Action was a major watershed in attitudes towards this issue. The adoption by the Committee on Economic, Social and Cultural Rights in May 1999 of general comment 12 has contributed significantly to the clarification of the content of the right and the corresponding State obligations. The consultations conducted by the High Commissioner for Human Rights and the symposium organized by the ACC/SCN have deepened and broadened that recognition;

Thirdly, that international institutions now broadly endorse the human rights approach to food and nutrition issues and have pledged themselves to act, separately and collectively, to contribute to the realization of these rights. The information given in chapter VIII about the commitments by UNICEF, FAO, WHO, WFP, IFAD and UNHCR, and the involvement of bodies such as the ACC/SCN, show that there is a new and potentially powerful momentum to act in a concerted way to eliminate the scourge of hunger from humanity.

127. The two main questions which remain are these: Will States, in light of the urgency of the matter, take all possible steps within their available resources to bring hunger to an end and to move towards full realization of the right to food? Secondly: Are other States, and thereby the international community, prepared to shoulder what is at least their moral obligation to respect and protect food and nutrition security in other countries and contribute as necessary, individually and collectively, to facilitating and fulfilling such security in countries in need?

128. The next few years will show whether States are prepared to move from rhetoric to realization of these rights which, if done in a concerted way, is fully within the power of the international community. Without energetic implementation both at the national and the international level, however, the insight gained will not lead to the aims set; at a minimum this includes the reduction of the number of undernourished people to half their 1996 level by 2015.

Recommendations

129. Many of the recommendations which follow have their origins in the consultations convened by the High Commissioner and the ACC/SCN symposium held on 12 and 13 April 1999. 10/

130. Recommendations concerning national implementation by States:

(a) States should elaborate a strategy for the realization for everyone within their territory of freedom from hunger and the right to adequate food. The strategy should include the elaboration of framework legislation as proposed in general comment 12, setting out its purpose; the targets or goals to be achieved and the time frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with

civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring;

(b) As part of the strategy, States should develop or expand national indicators on food insecurity in line with the FIVIMS initiative coordinated by FAO (see chapter VIII). This system is intended to absorb data from various bases within other United Nations agencies including the comprehensive nutrition related data set compiled by UNICEF in some regions;

(c) Other essential parts of the strategy are (i) to develop and maintain mechanisms to monitor progress towards the realization of the right to adequate food for all, and it should for this purpose establish appropriate mechanisms for handling the technical food and nutrition dimensions of domestic and international reporting; (ii) to identify the factors and difficulties affecting the degree of implementation of their obligations; and (iii) to facilitate the adoption of corrective legislative and administrative measures. This is important also where the country concerned has demonstrable resource constraints and where international assistance is therefore required to supplement exhausted domestic resources;

(d) As recommended by the ACC/SCN Commission on Nutrition Challenges for the 21st Century, national nutrition councils should be established in all countries; as part of their agenda they should expand the constituency of analysts and practitioners who can help advance the nutrition message and mission through the perspective of human rights and strengthen national nutrition monitoring and surveillance systems, improve methods of analysis and expand this analysis to include issues of accountability, contribute to improved national reporting on the nutrition situation, promote national endorsement of the draft international code of conduct on the right to adequate food, and promote dialogue between the nutrition and human rights communities so as to strengthen both communities and help provide the knowledge based and operational skills needed to advance the human right to food and nutrition.

131. Recommendations to States regarding international cooperation and prevention of deprivation:

(a) States should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food;

(b) States should respect the enjoyment of the right to food in other countries; among other things this means that they should at all times refrain from using food as a weapon. States participating in international sanctions should ensure that they do not lead to the deprivation of necessary food for the population;

(c) States should protect the right to food in other countries which, inter alia, requires that they should monitor the impact of their external aid and trade, as well as the impact of transnational corporations under their jurisdiction, on the enjoyment of the right to food in other countries and take corrective measures where a negative impact can be shown;

(d) States should facilitate access to food in countries other than their own, and provide the necessary aid when required. This does not necessarily or only mean food aid, but various categories of aid which enable the local population concerned to develop sustainable and effective entitlements to food either by its own production or by income generation. Donor States should increase their awareness of the importance of the effective enjoyment of the right to food, and make it a major concern in their development assistance;

(e) Creditor countries should adopt substantial debt relief measures in ways which facilitate the realization of the right to food and other economic and social rights for vulnerable groups in developing countries;

(f) States parties to international agreements, whenever relevant, should ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.

132. Recommendations to the High Commissioner for Human Rights

(a) The High Commissioner for Human Rights should continue to take the leadership role in promoting the implementation of the right to food and nutrition as a human right and to develop a comprehensive strategy for this purpose. Elements of such a strategy would include dialogue with States supplemented by advisory services and other forms of assistance. Partners in the elaboration and implementation of the strategy should include both the legal and the political human rights bodies, as well as the specialized agencies and other bodies, including NGOs;

(b) In order fully to respond to the request by the World Food Summit and taking into account that the general comment has contributed to the clarification of the right to food, the High Commissioner should now organize a broad consultation to draw up a coherent United Nations strategy for the implementation of freedom from hunger and the enjoyment of the right to food;

(c) The High Commissioner should strengthen her Office's capacity to deal with the substantive issues of the right to food, including the possibility of appointing an external adviser on the right to food in order to cooperate effectively with the Rome based food agencies and others involved;

(d) The High Commissioner should promote a coordinated approach to the right to adequate food throughout the United Nations system, making use for this purpose, inter alia, of the United Nations Development Assistance Framework (UNDAF);

(e) The High Commissioner should take appropriate steps to improve the professional, institutional and operational links between the concern for human rights and the mandates of the specialized agencies;

(f) Taking into account general comment 10, the High Commissioner should take steps to set in motion a study on the impact of globalization on the food and nutrition situation of vulnerable groups and on remedies which could be adopted in order to reverse negative impact;

(g) The High Commissioner should take steps to organize a third Expert Consultation following those in 1997 and 1998, this time with a focus on implementation mechanisms at country level, inviting government experts to bring experiences from their countries as a contribution to the operationalization at national level, including the drawing up of a framework law;

(h) The High Commissioner should also seek to organize a consultation involving, on the one hand, representatives of the treaty bodies, food agencies and humanitarian organizations and, on the other hand, the international financial and trade institutions, to enhance dialogue and encourage consultations on a regular basis and to prevent activities which would cause a further deterioration in the enjoyment of the right to food and other economic, social and cultural rights;

(i) The High Commissioner should initiate a study or similar activities intended to clarify the joint and separate responsibility of States, in accordance with the Charter of the United Nations, to cooperate in ensuring access to food for all in times of emergency with special attention to the situation during armed conflicts. The study could examine questions such as:

(i) What are the gaps in humanitarian, refugee and human rights law relating to the protection of human rights, including the right to adequate food, in the prevailing environment of today's acute crises?

(ii) How can the complementarity between these branches of international law be brought to bear more effectively?

(iii) How can the principle of State sovereignty be reconciled with such concepts as the right to assistance in complex emergencies and the right or duty to provide assistance?

(iv) How can the ethical and political conflicts often arising between the provision of food and other humanitarian assistance be reconciled with the protection of human rights in acute crises?

(v) Should the humanitarian imperative of meeting food and other essential necessities prevail under all circumstances in complex emergency situations?

(vi) Is there a need for new standard-setting on humanitarian assistance, and what would be its principal features? How would it affect the human right to adequate food?

(vii) How can conflict prevention, resolution, reconciliation and reconstruction be better integrated with the help of international human rights and humanitarian law?

133. Recommendations to treaty bodies:

(a) The Committee on Economic, Social and Cultural Rights, CEDAW and the Committee on the Rights of the Child should explore ways and means to establish cooperative links among themselves and with the specialized agencies. Working relationships should be institutionalized between these committees and the ACC/SCN with a view to ensuring the flow of information between them;

(b) The Committee should periodically or when need arises review its guidelines for State reporting. The Committee should draft new guidelines on the right to food, taking into account the content of its own general comment and the new understanding of the nature and consequences of hunger and malnutrition;

(c) In their review of State parties' reports, treaty bodies should request information about whether persons or groups who are victims of a violation of the right to adequate food have access to effective judicial or other appropriate remedies and whether they are entitled to adequate reparation.

134. Recommendations to the Commission on Human Rights:

(a) Whenever appropriate, the mandates of special rapporteurs on country situations should include investigations on violations of the right to adequate food;

(b) The Commission should envisage the appointment of a thematic rapporteur on freedom from hunger and the enjoyment of adequate food;

(c) The Commission should put on its agenda the question of adopting voluntary guidelines on the implementation of freedom from hunger and the right to food, taking into account, inter alia, the draft code of conduct on the human right to adequate food prepared by three non-governmental institutions and now endorsed by more than 800 organizations.

135. Recommendations to the specialized agencies and other bodies:

(a) Recognition and training:

(i) The agencies should individually define their human rights objectives and establish explicitly their human rights goals in relation to their particular mandate. Secondly, they should use or develop appropriate forums to ensure consensus, compatibility and the complementarity of their respective actions. Joint training and workshops would be helpful in ensuring a common approach;

(ii) Measures should be taken to strengthen the capacity of the staff to understand, articulate and analyse more effectively the economic, political and social context in which they work, which will be of direct use in their understanding of appropriate strategies in the fight against malnutrition;

(iii) Recognizing the importance of training for organizations adopting a rights-based approach, efforts to develop training materials on human rights related to food and nutrition should be undertaken or supported. Training materials might need to be tailored to incorporate issues of particular concern to the individual food agency;

(iv) The agencies, and the technicians and managers working in them, should learn more about human rights as they directly affect the specialized fields of the agency concerned. The skills should also be strengthened of the field staff in working with communities or finding the most appropriate partners to help communities accelerate their own processes of problem assessment and analysis and the formulation of effective actions to combat malnutrition;

(v) Conversely, human rights officers within the United Nations system should receive basic training in the major food and nutrition policy issues;

(b) Indicators and assistance:

(i) Efforts should be made to better develop indicators and benchmarks concerning the achievements and shortcomings in the realization of food and nutrition rights, particularly by contributing to the Food Insecurity and Vulnerability Information and Mapping System (FIVIMS) and other databases needed for special agency purposes;

(ii) FAO should offer its assistance, upon request, in drafting national framework legislation and in reviewing the sectoral legislation, taking into consideration FAO's considerable expertise and accumulated knowledge concerning legislation in the fields of food and agriculture. Similarly, UNICEF should make available on request its expertise concerning legislation with regard to the right to adequate food for infants and young children through maternal and child protection including legislation to enable breastfeeding, and to the regulation of marketing of breast milk substitutes;

(iii) The agencies should continue their efforts to promote participatory and intersectoral approaches to resolving malnutrition everywhere, in particular in women and children but also taking into account the changing patterns of nutritional diseases and groups affected by "the double

burden of disease", as well as the need to involve whole families, including men, in improving household nutrition;

(iv) In spite of the continuing difficulties and the new challenges posed by HIV/AIDS, the relevant agencies should continue to support, protect and promote practices of breastfeeding and the conditions required for it;

(c) Cooperation

(i) FAO, WFP and IFAD should continue to explore how to cooperate more effectively on the implementation of the right to food at the national level, with due respect for their individual mandates and building on their respective expertise. These and other agencies might collectively or individually collect, systematize and make available country cases of best practices on the implementation of the right to food;

(ii) The ACC Network on Food Security and Rural Development coordinated by the Rome-based agencies should be another vehicle besides the ACC/SCN through which to promote food security and reduce rural poverty from a human rights perspective;

(iii) Agencies should establish and make use of an internal mechanism to ensure that their own policies and programmes do not have a negative effect on the implementation by States of the right to food and nutrition.

136. Recommendations to NGOs, professional organizations and academic institutions:

(a) Non-governmental organizations should devote more attention to economic and social rights, including the right to food and nutrition. A link should be established between those NGOs which have focused their interest on the activities of the development agencies and those which have focused on the activities of the human rights bodies. Generally, there should be more interaction between human rights and development organizations;

(b) Associations of judges and lawyers, including bar associations, should train their members in addressing and applying or using economic and social rights on the same level as civil and political rights;

(c) Universities should as a special responsibility organize training courses in the interface between human rights law and food and nutrition policy analysis and planning, especially as it relates to globalization processes, sustainable agriculture and other development, gender issues and the global burden of disease.

Notes

1/ Most recently in resolution 1999/24.

2/ Right to Adequate Food as a Human Right, Human Rights Study Series No. 1, United Nations publication (Sales No. E.89.XIV.2), United Nations, New York, 1989.

3/ This figure is suggested by the Commission on the Nutrition Challenges for the 21st Century of the Administrative Committee on Coordination Subcommittee on Nutrition (ACC/SCN) led by Professor Philip James, which submitted its final report, entitled "Ending Malnutrition by 2020: an Agenda for Change in the Millennium" in March this year (hereafter "ACC/SCN report").

4/ In a keynote address by Dr. Brundtland to the ACC/SCN symposium entitled "The Substance and Politics of a Human Rights Approach to Food and Nutrition Policies and Programmes", held at the Palais des Nations in Geneva on 12 and 13 April 1999.

5/ Further details and country examples are found in the ACC/SCN report, supra note 3.

6/ Several of the arguments brought forward here are inspired by parts of the ACC/SCN report, supra note 3.

7/ The ACC/SCN report explains the causal linkages in poor societies as follows: "This life cycle of handicap has now been given a remarkable new slant with the discovery that third world adults moving from impoverished rural areas to seek new opportunities in towns and cities find that, with the marked changes in lifestyle and diet, their weight and health does seem to improve. However, as they put on modest amounts of weight, they selectively accumulate fat within their abdomen and develop a virulent form of abdominal obesity with an increased susceptibility to diabetes, high blood pressure and coronary heart disease. This abdominal obesity seems to explain the explosion in diabetes and cardiovascular disease in the very societies which have been or still are struggling to cope with the major problems of malnutrition. Maternal malnutrition seems to reprogramme the foetus so that in later life, with a change to a high-fat, energy-dense diet and with less physical activity, the adult displays the impact of foetal malnutrition. Obesity already affects 250 million people with a tidal wave of diabetes and visceral obesity emerging throughout the developing world. Most heart disease, strokes and cancers already occur in developing countries: these diet-related diseases now overwhelm health-care systems. There is new evidence that this health burden will accelerate by 2020. Many developing countries have over one-fifth of middle-aged adults with incipient or frank diabetes associated with abdominal obesity."

8/ The burden of HIV/AIDS, especially in Africa south of the Sahara, adds to the problem insofar as households which are hard hit may completely lose their ability to cope, in some families leaving children and the elderly as the major age groups. While this tragic scenario lies outside the question of the right to food, its impact on the realization of this right cannot be ignored.

9/ Statement to the ACC/SCN symposium, supra note 4.

10/ The right to an adequate standard of living is found in article 25 of the Universal Declaration of Human Rights, in article 11.1 of the International Covenant on Economic, Social and Cultural Rights, and in article 27 of the Convention on the Rights of the Child.

11/ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights is useful in this respect. They were drawn up in January 1997 by a group of experts, including members of treaty bodies, to assist mechanisms that monitor economic, social and cultural rights. The Guidelines are published in Human Rights Quarterly, vol. 20, No. 1, 1998; in the Netherlands Quarterly of Human Rights, vol. 15, No. 2, 1997, and in SIM Special No. 20, published by the Netherlands Institute of Human Rights.

12/ See further chapter 8 on the FIVIMS - Food Insecurity and Vulnerability Information and Mapping System - initiated by FAO.

13/ FAO, "The Right to Food in Theory and Practice", Rome, 1998, p. 32.

14/ The notion of food security was addressed at some length in my 1987 study. I criticized the prevailing focus on global food security, which erroneously assumed that there might emerge global deficits in food. In its place, based on the the work by Eide et al. on the notion of household food security, an integrated framework for the implementation of the right to food was developed. That approach has been further refined and increasingly accepted.

15/ "Understanding human rights approaches to food and nutritional security in Brazil", a document prepared by a working group in Brasilia and presented by Denise Costa Coitinho of the Brazilian Ministry of Health to the ACC/SCN symposium, supra note 4.

16/ A National Framework for the Promotion and Protection of the Rights to Food Security and Nutrition: A Case Study by the South African Human Rights Commission, presented by Tseliso Thipanyane to the ACC/SCN symposium, supra note 4.

17/ Paragraphs 21-26 of general comment 12.

18/ "Food as an Integral Part of International Protection" by Søren Jessen-Petersen, Assistant High Commissioner for Refugees, presented at the ACC/SCN symposium, supra note 4.

19/ Jacques Diouf, Director-General of FAO, in the Foreword to "The Right to Food in Theory and Practice", supra note 13.

20/ Statement made by Mr. A. Namanga Ngongi, Deputy Executive Director, World Food Programme, at the ACC/SCN symposium, supra note 4.

21/ Statement at the ACC/SCN symposium, supra note 4.

22/ Supra note 4.

23/ Supra note 9.

24/ The current members are the United Nations, UNICEF, UNDP, the United Nations Environment Programme (UNEP), the United Nations Population Fund (UNFPA), WFP, UNHCR, the United Nations University (UNU), the United Nations Research Institute for Social Development (UNRISD), the Office of the United Nations High Commissioner for Human Rights (OHCHR), ILO, FAO, UNESCO, WHO, the World Bank, IFAD, the International Atomic Energy Agency (IAEA) and the Asian Development Bank. Bilateral donor agencies participate actively in SCN activities and non-governmental organizations are increasingly involved. The secretariat is hosted by WHO in Geneva.

25/ Michael Windfuhr, NGOs and the right to adequate food, in "The Right to Food in Theory and Practice", supra note 13.

26/ For further details about the code, see ibid.

27/ The International Union for the Protection of New Varieties of Plants, known as UPOV, is an intergovernmental organization with headquarters in Geneva. (The acronym UPOV is derived from the French name of the organization, Union internationale pour la protection des obtentions végétales.) The Convention for the Protection of New Varieties of Plants (the "UPOV Convention") was signed in Paris in 1961 and latest revised in the 1991 Act which entered into force on 24 April 1998. Its purpose is to ensure that the member States of the Union acknowledge the achievements of breeders of new plant varieties, by making available to them an exclusive property right, on the basis of a set of uniform and clearly defined principles. Protected varieties must, in short, be "distinct, uniform, and stable". Such requirements would disqualify most farmer-developed varieties which, for agronomic purposes, are not uniform or stable, but diverse and changing. Under an earlier (1978) Act, the minimum scope of the plant breeder's right requires that the holder's prior authorization is necessary for "the production for purposes of commercial marketing, the offering for sale and the marketing of propagating material of the protected variety". The 1991 Act contains more detailed provisions defining the acts concerning propagating material in relation to which the holder's authorization is required.

28/ See FAO resolutions 4/89 and 5/89.

29/ Consumers International, formerly International Organization of Consumer Unions. See http://193.128.6.150/consumers/about/rights.html for details on consumers' rights and duties.

30/ The present author participated in all of these (as keynote speaker or panelist, and sometimes also as chairman or rapporteur), and has therefore greatly benefited from these meetings.

Annex

GENERAL COMMENT 12 - THE RIGHT TO ADEQUATE FOOD (art. 11)

Introduction and basic premises

1. The human right to adequate food is recognized in several instruments under international law. The International Covenant on Economic, Social and Cultural Rights deals more comprehensively than any other instrument with this right. Pursuant to article 11.1 of the Covenant, States parties recognize "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions", while pursuant to article 11.2 they recognize that more immediate and urgent steps may be needed to ensure "the fundamental right to freedom from hunger and malnutrition". The human right to adequate food is of crucial importance for the enjoyment of all rights. It applies to everyone; thus the reference in article 11.1 to "himself and his family" does not imply any limitation upon the applicability of this right to individuals or to female-headed households.

2. The Committee has accumulated significant information pertaining to the right to adequate food through examination of States parties' reports over the years since 1979. The Committee has noted that while reporting guidelines are available relating to the right to adequate food, only few States parties have provided information sufficient and precise enough to enable the Committee to determine the prevailing situation in the countries concerned with respect to this right and to identify the obstacles to its realization. This General Comment aims to identify some of the principal issues which the Committee considers to be important in relation to the right to adequate food. Its preparation was triggered by the request of Member States during the 1996 World Food Summit, for a better definition of the rights relating to food in article 11 of the Covenant, and by a special request to the Committee to give particular attention to the Summit Plan of Action in monitoring the implementation of the specific measures provided for in article 11 of the Covenant.

3. In response to these requests, the Committee reviewed the relevant reports and documentation of the Commission on Human Rights and of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the right to adequate food as a human right; devoted a day of general discussion to this issue at its seventh session in 1997, taking into consideration the draft international code of conduct on the human right to adequate food prepared by international non-governmental organizations; participated in two expert consultations on the right to adequate food as a human right organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR), in Geneva in December 1997, and in Rome in November 1998 co-hosted by the Food and Agriculture Organization of the United Nations (FAO), and noted their final reports. In April 1999 the Committee participated in a symposium on "The substance and politics of a human rights approach to food and nutrition policies and programmes", organized by the Administrative Committee on Coordination/Sub-Committee on Nutrition of the United Nations at its twenty-sixth session in Geneva and hosted by OHCHR.

4. The Committee affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.

5. Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate food, a disturbing gap still exists between the standards set in article 11 of the Covenant and the situation prevailing in many parts of the world. More than 840 million people throughout the world, most of them in developing countries, are chronically hungry; millions of people are suffering from famine as the result of natural disasters, the increasing incidence of civil strife and wars in some regions and the use of food as a political weapon. The Committee observes that while the problems of hunger and malnutrition are often particularly acute in developing countries, malnutrition, under-nutrition and other problems which relate to the right to adequate food and the right to freedom from hunger, also exist in some of the most economically developed countries. Fundamentally, the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food, inter alia because of poverty, by large segments of the world's population.

Normative content of article 11, paragraphs 1 and 2

6. The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.

Adequacy and sustainability of food availability and access

7. The concept of adequacy is particularly significant in relation to the right to food since it serves to underline a number of factors which must be taken into account in determining whether particular foods or diets that are accessible can be considered the most appropriate under given circumstances for the purposes of article 11 of the Covenant. The notion of sustainability is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations. The precise meaning of "adequacy" is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while "sustainability" incorporates the notion of long-term availability and accessibility.

8. The Committee considers that the core content of the right to adequate food implies:

The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;

The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

9. Dietary needs implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation. Measures may therefore need to be taken to maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns, including breastfeeding, while ensuring that changes in availability and access to food supply as a minimum do not negatively affect dietary composition and intake.

10. Free from adverse substances sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins.

11. Cultural or consumer acceptability implies the need also to take into account, as far as possible, perceived non-nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.

12. Availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.

13. Accessibility encompasses both economic and physical accessibility:

Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.

Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to

accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.

Obligations and violations

14. The nature of the legal obligations of States parties are set out in article 2 of the Covenant and has been dealt with in the Committee's General Comment No. 3 (1990). The principal obligation is to take steps to achieve progressively the full realization of the right to adequate food. This imposes an obligation to move as expeditiously as possible towards that goal. Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.

15. The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. Originally three levels of obligations were proposed: to respect, protect and assist/fulfil. (See Right to adequate food as a human right, Study Series No. 1. New York, 1989 (United Nations publication, Sales No. E.89.XIV.2).) The intermediate level of "to facilitate" has been proposed as a Committee category, but the Committee decided to maintain the three levels of obligation. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must pro actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.

16. Some measures at these different levels of obligations of States parties are of a more immediate nature, while other measures are more of a long term character, to achieve progressively the full realization of the right to food.

17. Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply. Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This follows from article 2.1 of the Covenant, which obliges a State party to take the necessary steps to the maximum of its available resources, as previously pointed out by the Committee in its General Comment No. 3, paragraph 10. A State claiming that it is unable to carry out its

obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.

18. Furthermore, any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

19. Violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States. These include: the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is pro-active; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations.

20. While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society - individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities in the realization of the right to adequate food. The State should provide an environment that facilitates implementation of these responsibilities. The private business sector - national and transnational - should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.

Implementation at the national level

21. The most appropriate ways and means of implementing the right to adequate food will inevitably vary significantly from one State party to another. Every State will have a margin of discretion in choosing its own approaches, but the Covenant clearly requires that each State party take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food. This will require the adoption of a national strategy to ensure food and nutrition security for all, based on human rights principles that define the objectives, and the formulation of policies and corresponding benchmarks. It should also identify the resources available to meet the objectives and the most cost-effective way of using them.

22. The strategy should be based on a systematic identification of policy measures and activities relevant to the situation and context, as derived from the normative content of the right to adequate food and spelled out in

relation to the levels and nature of States parties' obligations referred to in paragraph 15 of the present General Comment. This will facilitate coordination between ministries and regional and local authorities and ensure that related policies and administrative decisions are in compliance with the obligations under article 11 of the Covenant.

23. The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.

24. Appropriate institutional mechanisms should be devised to secure a representative process towards the formulation of a strategy, drawing on all available domestic expertise relevant to food and nutrition. The strategy should set out the responsibilities and time-frame for the implementation of the necessary measures.

25. The strategy should address critical issues and measures in regard to all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security. Care should be taken to ensure the most sustainable management and use of natural and other resources for food at the national, regional, local and household levels.

26. The strategy should give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology; measures to respect and protect self-employment and work which provides a remuneration ensuring a decent living for wage earners and their families (as stipulated in article 7 (a) (ii) of the Covenant); maintaining registries on rights in land (including forests).

27. As part of their obligations to protect people's resource base for food, States parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food.

28. Even where a State faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals.

Benchmarks and framework legislation

29. In implementing the country-specific strategies referred to above, States should set verifiable benchmarks for subsequent national and international monitoring. In this connection, States should consider the adoption of a framework law as a major instrument in the implementation of the

national strategy concerning the right to food. The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures. In developing the benchmarks and framework legislation, States parties should actively involve civil society organizations.

30. Appropriate United Nations programmes and agencies should assist, upon request, in drafting the framework legislation and in reviewing the sectoral legislation. FAO, for example, has considerable expertise and accumulated knowledge concerning legislation in the field of food and agriculture. The United Nations Children's Fund (UNICEF) has equivalent expertise concerning legislation with regard to the right to adequate food for infants and young children through maternal and child protection including legislation to enable breastfeeding, and with regard to the regulation of marketing of breast milk substitutes.

Monitoring

31. States parties shall develop and maintain mechanisms to monitor progress towards the realization of the right to adequate food for all, to identify the factors and difficulties affecting the degree of implementation of their obligations, and to facilitate the adoption of corrective legislation and administrative measures, including measures to implement their obligations under articles 2.1 and 23 of the Covenant.

Remedies and accountability

32. Any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National Ombudsmen and human rights commissions should address violations of the right to food.

33. The incorporation in the domestic legal order of international instruments recognizing the right to food, or recognition of their applicability, can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases. Courts would then be empowered to adjudicate violations of the core content of the right to food by direct reference to obligations under the Covenant.

34. Judges and other members of the legal profession are invited to pay greater attention to violations of the right to food in the exercise of their functions.

35. States parties should respect and protect the work of human rights advocates and other members of civil society who assist vulnerable groups in the realization of their right to adequate food.

International obligations

States parties

36. In the spirit of article 56 of the Charter of the United Nations, the specific provisions contained in articles 11, 2.1, and 23 of the Covenant and the Rome Declaration of the World Food Summit, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.

37. States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in its General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.

States and international organizations

38. States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task in accordance with its ability. The role of the World Food Programme (WFP) and the Office of the United Nations High Commissioner for Refugees (UNHCR), and increasingly that of UNICEF and FAO is of particular importance in this respect and should be strengthened. Priority in food aid should be given to the most vulnerable populations.

39. Food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries. Such aid should be based on the needs of the intended beneficiaries. Products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population.

The United Nations and other international organizations

40. The role of the United Nations agencies, including through the United Nations Development Assistance Framework (UNDAF) at the country level, in promoting the realization of the right to food is of special importance. Coordinated efforts for the realization of the right to food should be maintained to enhance coherence and interaction among all the actors concerned, including the various components of civil society. The food organizations, FAO, WFP and the International Fund for Agricultural Development (IFAD) in conjunction with the United Nations Development Programme (UNDP), UNICEF, the World Bank and the regional development banks,

should cooperate more effectively, building on their respective expertise, on the implementation of the right to food at the national level, with due respect to their individual mandates.

41. The international financial institutions, notably the International Monetary Fund (IMF) and the World Bank, should pay greater attention to the protection of the right to food in their lending policies and credit agreements and in international measures to deal with the debt crisis. Care should be taken, in line with the Committee's General Comment No. 2, paragraph 9, in any structural adjustment programme to ensure that the right to food is protected.